THE LAW RELATING TO CHARTER-PARTIES

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RELATING TO

CHARTER-PARTIES

BY

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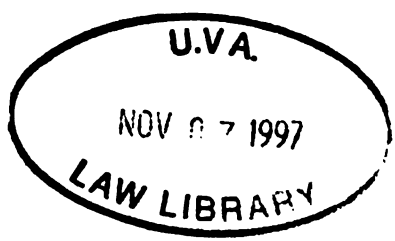

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INTRODUCTION

ALTHOUGH there is no diminution in the number of legal practitioners, there is an increasing desire on the part of business men to know something of "how they stand" in certain circumstances without having recourse to their solicitors. They do not, however, wish to go to the expense of costly Law books, and it is even possible some of them recognise that were they to do so, the last state would be worse than the first. What they desire is *the Law laid down plainly and concisely*, in volumes which are neither bulky nor expensive. This is particularly the position in Shipping affairs, where all concerned in the industry —be they Owners, Brokers, Merchants or Officers— are almost daily confronted with some legal problem or another, small perhaps in itself, but yet of importance to them.

To meet this demand the Syren & Shipping, Limited, arranged in 1907 for the issue of a series of HANDBOOKS ON SHIPPING LAW. Whilst brevity and moderate cost were two essentials aimed at, the absolute necessity of accuracy was also kept in mind, so that the inquirer who consulted the work would have no cause to fear that the information provided would lead him in the path he should not take. That these aims have been fulfilled, the success attendant on the first volumes of the series, *The Law relating to Demurrage*, and *The Law relating to Freight*, affords an ample proof.

Every care has been exercised in the preparation

of the present volume, which deals with the Law relating to Charter-Parties. Consequently, the publishers confidently look forward to its meeting with a reception no less gratifying than that which marked the issue of its predecessors.

THE SYREN & SHIPPING,
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LONDON, E.C.,
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PREFACE

DIFFERENT authors adopt different methods in writing a legal text-book. Some merely state general principles, and refer in the foot-note to the authorities, without giving any details of the cases decided. Others state a proposition and then give the facts of the more important cases on the point, and now and then quotations from the judgments. The former method involves less work for the author, and it has its advantages in that the subject can be condensed within a much smaller space. But to the business man it is almost useless, as he has no means of referring to the cases to see whether the facts were at all similar to his own. To properly understand a decision, it is necessary to have before one the leading facts of the case upon which the judge gave his decision. I have therefore adopted the latter method. Of course it has been impossible for me in every case to give the facts, as space would not permit of that being done; but where I have considered there was any doubt or difficulty, I have endeavoured to do so. In other cases the law is so well settled and clear, that it seemed unnecessary to do more than state the principle.

In the present work, as well as that on Bills of Lading, I have inserted in the Table of Cases the year in which each case was decided. This has considerably added to the labour of preparing this

work for the press, but in this task I have been ably assisted by Mr F. O. Low, of the Middle Temple.

I shall always be grateful to receive any notices of errors or omissions, or suggestions for improvements for a subsequent edition.

J. E. R. STEPHENS.

2 Essex Court,
Temple, E.C.,
April 1908.

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ACCIDENTS

IN *The Torbryan* (1), sugar in bags was shipped under a charter-party exempting the shipowner from liability for loss or damage arising from the usual perils "and all other accidents, even though caused by negligence, fault, or error of judgment on the part of the pilot, captain, sailors, or other servants of the owner in the management or navigation of the vessel or otherwise." In the process of discharge stevedore's men, employed by the ship, recklessly used hooks which tore the bags, and carelessly allowed the bags to be cut by the slings and to burst through striking against the hatch-coamings whilst being lifted out of the hold. In an action by the charterers for damage to, and short delivery of, the sugar, it was held by the Court of Appeal that the shipowner was not liable, as the loss was covered by the exception "accidents . . . caused by negligence . . . of the servants of the owner, otherwise than in the management or navigation of the vessel."

It was held in *Fenwick* v. *Schmalz* (2) that a snowstorm was not an "accident."

(1) 1903, P. 194. (2) 1868, 3 C.P. 313.

In the case of *Garston Sailing Ship Company* v. *Hickie* (1), Lord Esher distinguishes between a peril of the seas and a peril or accident of navigation (2).

ACCIDENTS BEYOND THE MASTER'S CONTROL

An inability on the part of either party to fulfil the agreement, occasioned by something that happens in the ordinary course of things, is not within such an exception as "accidents beyond his control." Thus, where by the charter-party the charterers were to load in regular and customary turn, except in the case of riots, strikes, or other accidents beyond their control, which might prevent or delay the loading, it was held that they were not excused by the snow being so deep on the ground as to render it impossible to bring the cargo to the place of shipment, a fall of snow being one of the ordinary operations of nature, and not in popular language an accident (3). As to an extraordinary fall of snow, see the judgment of Smith, J., in that case.

ACCORDING TO THE CUSTOM OF THE PORT

"Custom," or "customary," does not mean "custom" in the strict legal sense, but a settled and established practice of the port (4). A charter-party contained this clause: "Cargo to be brought to and taken from alongside the ship at merchant's risk and expense." It also contained the following clause in writing: "Cargo to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver, and according to the custom of the respective ports." It was held that the two clauses were not contradictory, and that evidence as to custom, for the purpose of throwing upon the shipowner the expense of taking the cargo

(1) 18 Q.B.D. 17.

(2) See also *Chartered Mercantile Bank* v. *Netherlands Steam Navigation Company*, 10 Q.B.D. 521, 530; *Lloyd* v. *General Iron Screw Colliery Company*, 33 L.J. Ex. 269, 272.

(3) *Fenwick* v. *Schmalz*, 18 L.T. 27.

(4) Per Lord Blackburn, approving Lord Coleridge in *Postlethwaite* v. *Freeland* (1880), 5 A.C., p. 616.

from the ship's rail and landing it on the quay, was not admissible (1).

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All Hire Earned

Where by a contract in a time charter-party the broker is to be paid a commission "on all hire earned," and the charter-party is cancelled without wilful default on the part of his principal, the broker is not entitled to commission on the hire for the unexpired term of the charter-party (3).

All other Conditions as per Charter (4)

Alongside

When the contract provides that the cargo is to be brought "alongside" by the charterer, that means actually to the edge of the wharf and to the side of the ship (5). If the loading is done by lighters, the cost of lightering must be paid by the charterer, though the vessel may not be able to lie at the usual loading-place (6). A custom that, in discharging long lengths of timber from a ship, the shipowner is bound to put the timber into lighters brought alongside by the consignees, is not inconsistent with a charter-party which provides that the timber shall be taken from alongside at merchant's expense (7). In this case oral evidence was admitted to explain what was meant by "alongside" and "delivery" at a particular port.

Charters often stipulate that the cargo shall be taken

(1) *The Nifa* (1892), P. 411. See *Scrulton* v. *Childs*, 3 Asp. M.C. 373; *Holman* v. *Wade*, *Times* newspaper, May 11, 1877; *Hayton* v. *Irwin*, 5 C.P.D. 130; *Lishman* v. *Christie*, 19 Q.B.D. 333; *The Curfew* (1891), P. 131.

(2) See author's work on Bills of Lading.

(3) *White* v. *Turnbull, Martin & Co.*, 3 Com. Cas. 183.

(4) *See* author's works on Bills of Lading and Freight.

(5) *Fletcher* v. *Gillespie*, 3 Bing. 635; *cf. Holman* v. *Dasnieres*, 2 T.L.R. 607; *Petersen* v. *Freebody* (1895), 2 Q.B. 294; *The Nifa* (1882), P. 411. But see *Aktieselkab Helios* v. *Ekman* (1897), 2 Q.B. 83; *Stephens* v. *Wintringham*, 3 Com. Cas. 169.

(6) *Trindade* v. *Levy*, 2 F. and F. 441.

(7) *Aktieselkab Helios* v. *Ekman* (1897) 2 Q.B. 83.

from "alongside" by the merchant. The meaning of this generally is that the merchant is to take the goods as they are passed out of the ship, either on to the quay or into lighters; and in the latter case the merchant must provide the lighters, whatever the custom may be (1). If the shipowner is put to expense in consequence of a failure of the merchant to supply the men and appliances to take delivery in this manner, he is entitled to recover it from the charterer.

In *Holman* v. *Wade* (2) a cargo of timber was to be delivered at Hull, and to be "taken from alongside the ship at the merchant's risk and expense, as customary." The cargo had to be stacked on the quay; and as the merchant refused to stack it, the master did so, and sued for the expense. A custom of the port of Hull was set up that the ship should bear the expense of stacking the timber on the quay in such a case; but the Court of Appeal excluded evidence of the custom as being inconsistent with the contract (3). In *Lishman* v. *Christie* (4) the charter-party provided that "the ship should load, as customary, a full cargo of fir," and that "the cargo should be brought to and taken from alongside the ship at merchant's risk and expense"; and Lord Esher expressed his opinion that custom could not be admitted to vary evidence of the provision as to the discharge of the cargo. In *The Nifa* (5) a charter-party contained two clauses: "cargo to be taken from alongside at merchant's expense," and "to be discharged according to custom of the port." It was held that these clauses were not contradictory, and therefore evidence of custom was inadmissible to charge the shipowner with the cost of unloading. The reference in the charter to the custom of the port related to the manner and place of discharge, and did not alter the obligation to take from alongside.

By a charter-party a ship was to deliver cargo, as customary, at such place as the consignee might direct, always afloat; cargo to be taken from alongside at port of

(1) But *cf. Scrulton* v. *Childs*, 36 L.T. 212.
(2) *Times* newspaper, May 11, 1877.
(3) See also *Hayton* v. *Irwin*, 5 C.P.D. 130.
(4) 19 Q.B.D. 333. (5) (1892) P. 411.

discharge, always within reach of ship's tackles, and at merchant's risk and expense, vessel always lying afloat; the custom of each port to be observed in all cases where not specially expressed. The cargo consisted of log timber, to be delivered at the port of Belfast, and a custom of that port was proved to the effect that the delivery of log timber to the consignee was to be made after the ship had chained and rafted the timber, and it had been measured by the official measurer. It was held that the consignee, and not the shipowner, was liable to pay the expense of such rafting. It was held also that, as the measuring was for the benefit of both shipowner and consignee, the latter was not entitled to waive the chaining and measuring and insist on the timber being delivered log by log over the vessel's side (1).

In *Stephens* v. *Wintringham* (2) a charter-party provided that the cargo, which consisted of timber, should "be taken from alongside at merchant's risk and expense, according to the custom of the port." The vessel discharged at the port of Grimsby. By the custom of that port, timber cargoes are taken from the ship's holds by means of the ship's winches and slings by stevedores employed and paid by the shipowner, and by them carried to the far side of the quay, about 60 feet from the side of the vessel, and there "lumped" or roughly piled. It was practically impossible to deposit the cargo on any other part of the quay. It was held that the shipowner was bound to carry the cargo across the quay and "lump" it at his own expense, and that such delivery constituted delivery "alongside," within the meaning of the charter-party.

By a charter-party a cargo of timber was to be shipped at a Baltic port and delivered at the Surrey Commercial Docks, London. The charter-party contained a clause: "The cargo to be brought to, and taken from, alongside the steamer at charterer's risk and expense, any custom of the port notwithstanding." The Court of Appeal held that the exclusion of the custom of the port related to the whole clause, and that the shipowners were therefore only bound to deliver over the ship's rail, and were not bound

(1) *Northmoor S.S. Company* v. *Harland* [1903], 2 Ir. R. 657.
(2) 1898, 3 Com. Cas. 169.

by any custom of the port of London requiring a shipowner to do work outside the ship (1).

It was held by the American Circuit Court of Appeals in *Seager* v. *New York and C. Mail S.S. Company* (2) that the custom of the port of New York, requiring a vessel discharging hemp to pile the bales on the dock for one-half of its width and the length of the vessel, is not inconsistent with a clause of a charter-party providing that "cargo shall be received and delivered alongside of the vessel . . . within reach of her tackles," and the charterer is not liable to the vessel for the expense of such piling.

ALWAYS AFLOAT

Where the ship was to "load as customary, always afloat, at such wharf, jetty, or anchorage as the charterers' agent may direct," the charterers were within their right in ordering the ship to a jetty at which she could only be partly loaded afloat, the practice of the port being to complete the loading at an anchorage (3). The clause "at all times of the tide and always afloat" will relieve the ship of the duty of waiting in a tidal river or harbour till the tide serves her to proceed to the dock or wharf where she is to discharge; under it the charterer will be required to name a loading or discharging berth, where she can lie "always afloat, at all times of the tide." The clause "always afloat" alone will not justify a vessel in declining to go to a berth where she cannot lie continuously always afloat, if she can do so partly before and partly after neap tides (4). In *The Curfew* (5) the ship was chartered to "proceed to the (defendants') loading berth, North Dock, Swansea, and there load, always afloat, a full and complete cargo." But it was agreed that if she was unable to complete the loading at that dock, the charterers were to bear the expense of completing elsewhere. The ship could have completed, always afloat, in the North Dock; but had she done so she would have been neaped, and detained several days. The

(1) *The Brenda S.S. Company* v. *Green*, 1900, 1 Q.B. 518.

(2) 55 Fed. Rep. 880.

(3) *Aktieselkabet Inglewood* v. *Millar's, etc., Forests*, 8 Com. Cas. 196; *cf. Carlton S.S. Company* v. *Castle, etc., Company*, [1898], A.C. 486.

(4) See author's work on Demurrage, p. 102.

(5) 1891, P. 131.

shipowner moved her, when partly loaded, to another dock. It was held that the shipowners were liable for the cost of the carriage to the other dock, as the vessel could, within the meaning of the charter-party, have been loaded in the North Dock, always afloat, and the fear of the detention of the vessel did not justify them in removing her.

In *Allen* v. *Coltart* (1) a charter-party provided that the ship should load with cargo and proceed therewith to a port "to discharge in a dock as ordered on arriving, if sufficient water, or so near thereto as she may safely get, always afloat." On arriving at the port, she was ordered to the C. dock, but there was not for four weeks sufficient water in the C. dock. It was held that the ship was only bound to discharge in the dock named if there was sufficient water there at the time the order was given.

Words like "always afloat" may operate as a condition of the shipowner's obligation to carry the goods to the agreed destination. A bill of lading required delivery to be "at the port of Sutton Bridge, *always afloat*." On arrival in Yarmouth Roads the master found that it would be impossible for his vessel to discharge the whole, or any substantial part, of her cargo at Sutton Bridge without taking the ground; he therefore refused to go there, and discharged at King's Lynn, the nearest practicable place. It was held that he was justified in doing so (2).

AND / OR

This expression means that the words between which they are placed may be read either as if they were conjoined or as if they were disjoined. Thus under an agreement "to load a full and complete cargo of sugar, molasses, and / or other lawful produce," the parties are to load either a full and complete cargo of sugar and molasses and other lawful produce, or a full and complete cargo of sugar and

(1) 1883, 11 Q.B.D. 782.
(2) *Treglia* v. *Smith's Timber Company*, 1 Com. Cas. 360.

molasses, or a full and complete cargo of other lawful merchandise (1).

Any Custom to the Contrary notwithstanding

Discharges with more than customary despatch can be secured by such words as "to be discharged continuously, any custom of the port to the contrary notwithstanding." In *Maclay* v. *Spillers* (2) a bill of lading provided that the goods were to be received by the consignee "immediately the vessel is ready to discharge, and continuously at all such hours as the Custom House authorities may give permission for the ship to work, any custom of the port to the contrary notwithstanding." It was held that, immediately the ship was ready to discharge, there was an absolute obligation on the consignee to receive the cargo continuously, even though the appliances of the port were not then available.

As Customary

The obligation to load or unload in a reasonable time, imports, without express reference, a stipulation that the work shall be done in the manner customary in the port (3). But an express provision, "according to the custom of the port," or "with customary despatch," or "as customary," is often inserted, and in that case every impediment arising out of that custom or practice, which the charterer or shipowner could not have overcome by the use of any reasonable diligence, ought to be taken into consideration. In *Carali* v. *Xenos* (4) a shipowner being sued on a clause in a bill of lading by which he was bound to forward the goods by steamer from London to a foreign port, the breach of duty being in not using due diligence to do so, whereby the season was lost, it was held that it was not enough that he had

(1) *Cuthbert* v. *Cumming*, 10 Ex. A., p. 814. See also *Stanton* v. *Richardson*, 45 L.J. C.P., at p. 82; *Bowes* v. *Stanton*, 2 A.C. App. 462, 463.

(2) 6 Com. Cas. 217.

(3) See per Lord Blackburn, *Postlethwaite* v. *Freeland*, 1880, 5 A.C., at p. 613; A. L. Smith, L.J., *Lyle* v. *Cardiff* (1900), 2 Q.B., at p. 643; Collins, M.R., *Temple* v. *Runnalls* (1902), 18 T.L.R., at p. 823. Lord Herschell thought otherwise (*Hick* v. *Raymond* (1893), A.C., at p. 30).

(4) 2 F. and F. 740.

let the discharge and sorting of the cargo take the usual course of business at the docks where the vessel discharged, if he neglected means which might well have been used to hasten the sorting and to procure vessels for the transhipment.

As fast as Master shall Require

Kennedy, J., in *Sea S.S. Company* v. *Price* (1), said: "I do not pretend in these two days to have gone into research to find a case in which 'as fast as master shall require' has received any different interpretation than 'as fast as vessel can deliver,' and if one were to hazard the opinion, I should say that the Court would come to the same conclusion. It must mean as fast as the master shall require, having regard to the circumstances of the port and reasonable compliance with those circumstances. He is entitled to have that reasonable despatch which the circumstances of the port warrant."

As fast as Steamer can Deliver

Discharge of cargo "as fast as steamer can deliver, as customary," or "as fast as she can deliver," means as fast as reasonably possible in a business sense (2).

As nearly as possible a Steamer a Month

Under a charter for a series of ships "as nearly as possible a steamer a month," to be loaded in a fixed time. Owing to excepted perils, two steamers arrived at the same time and could not, with the resources of the port, be loaded in the fixed time. The Court of Appeal held that, as the shipowner was not liable for the delay, the charterer was not excused by it (3).

At all Times of the Tide

A charter-party provided that a steamship should load a cargo of timber, and being so loaded proceed to Sharp-

(1) 8 Com. Cas. 296. (2) See author's work on Demurrage, pp. 37–43.
(3) *Potter* v. *Burrell* (1897), 1 Q.B. 97.

ness, "or so near thereto as she may safely get at all times of the tide, and always afloat." On the 5th September the ship arrived at King Road, a place 16 miles from Sharpness, and not within the ambit of its port, but which, in the state of the tides prevailing on that day, was as near thereto as she could get with her full cargo, always afloat. The captain offered to deliver at King Road the whole cargo, or so much as would lighten the ship enough for her to proceed to Sharpness. The charterers refused. On the 9th September the state of the tides permitted the ship to proceed, and she did proceed to Sharpness, and delivered her cargo. It was held by North, J., that on the true construction of the charter-party the ship was not bound to reach a spot within the ambit of the port of Sharpness, and that the insertion of the words "at all times of the tide" relieved the shipowner from any liability to wait a reasonable time for the tide, and that he was entitled to demurrage on the basis of the voyage having terminated on the ship's arrival at the nearest place to Sharpness that she could reach with a full cargo in the state of the tides prevailing at the time of her arrival (1). *See* "Always Afloat."

At Current or any Rate of Freight

Under a voyage charter it was provided that the captain should sign bills of lading at the current or any rate of freight without prejudice to the charter. The captain signed bills making the freight payable in advance at port of loading to the charterers, not the owners. It was held that such a term was beyond the authority conferred on him (2). If the clause had been to sign bills of lading as presented, he would have been bound to sign them, though all freight was made payable in advance (3).

(1) *Horsley* v. *Price*, 49 L.T. 101.

(2) *The Canada* (1897), 13 T.L.R. 238.

(3) *Janentsky* v. *Langridge* (1895), 1 Com. Cas. 90. *Cf. The Skillito* (1897), 3 Com. Cas. 44; *West Hartlepool Company* v. *Tagart, Beaton & Co.* (1902), 18 T.L.R. 358. See also "As presented without prejudice to Charter," in author's work on Bills of Lading.

At Ship's Risk

By a charter-party a vessel was to proceed to a port, and there load a cargo from the shore by the ship's boats and crew, at ship's risk and expense. A part of the cargo was lost, after delivery from the shore and before it was loaded on board, through one of the perils enumerated in the exceptions in the charter-party. In an action by the charterer for the non-delivery of this part of the cargo, it was held that the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, and that consequently the exceptions applied, and the shipowner was not liable for the non-delivery (1). Lord Esher, M.R., said: "The duty of the shipowner is to proceed to the place where the goods are, and to be ready to take them on board. If he is prevented from taking them on board by one of the excepted perils, he is excused from delivery. If this charter-party had been in the ordinary form, it would have been the duty of the charterer to bring his goods alongside so as to deliver them into the ship. The provisions of the charter-party would not be applicable to these goods during the transit from the shore to the ship, because they are not at that time brought within the purview of the charter-party. If it were not for this exceptional clause the shipowner would have nothing to do with the goods during transit from the shore to the ship. Supposing that without such a clause the shipowner, not being under any obligation to carry from the shore to the ship, were to agree with the charterer that he would do so. That would be an independent contract, and would certainly not bring the goods within the charter-party. In the present case it is put into the charter-party that the shipowner will do it, but he does not undertake that he will take the goods at all risks, but at ship's risk. To my mind it is clear that this means that he will take them at the same risk as the ship would be liable to when the goods were on board. The expression 'at ship's risk' cannot be

(1) *Nottebohm* v. *Richter*, 18 Q.B.D. 63, 65.

strictly correct, because the ship has no risk, but I cannot doubt that the meaning is that the shipowner will take the goods and, when once they are in his possession, treat them as to risks as if they were on board" (1).

Where a charter-party exempted the ship from liability for loss by act of God, floods, or any extraordinary occurrence beyond control of either party, "and all and every other danger and accidents of the seas," of whatsoever nature and kind, during the voyage, the ship was not liable for loss of timber which had been delivered at the ship's side, and lost by reason of a violent storm, notwithstanding the utmost care, diligence, and effort on the part of both the claimant and the ship's crew, under another provision of the charter-party declaring that the cargo was to be delivered alongside, at merchant's risk and expense, and to be received by the master and secured by the ship's dogs and chains when so delivered, and to be then at the ship's risk (2).

CARGO

Meaning of "cargo."

"The word 'cargo,' as referred to a ship, is very intelligible, and must mean the whole loading. It may as well be said that the word 'ship' is uncertain, one being much bigger than another" (3). "Cargo," and, generally, "freight," are terms applicable to goods only (4). "Generally speaking, the term 'cargo,' unless there is something in the context to give it a different signification, means the entire load of the ship which carries it" (5). In a contract to deliver at a port to be named by the purchaser, "a small cargo of about 60 fathoms of lathwood," the word "cargo" means an entire shipload, and therefore the purchaser is not bound to accept 60 fathoms, measured and set apart for him by the settler's agent at the port named, out of a shipload containing 83 fathoms of lathwood (6).

(1) See also per Willes, J., in *Barker* v. *M'Andrew*, 18 C.B. N.S. 759.

(2) *Southerland-Innes Company* v. *Thynas*, 128 Fed. Rep. 42. See also *Insurance Company of North America* v. *North German Lloyd Company*, 110 Fed. Rep. 420.

(3) Per Cur, *Sargent* v. *Read*, 2 Stra. 1228.

(4) *Lewis* v. *Marshall*, 13 L.J. C.P. 193.

(5) Per Mellish, L.J., *Borrowman* v. *Drayton*, 2 Ex. D. 19. But see *Caffin* v. *Aldridge*, 64 L.J. Q.B. 736.

(6) *Kreuger* v. *Blanck*, 39 L.J. Ex. 160.

Where a buyer contracts for a "cargo" and mentions the quantity (unless something plainly shows the contrary to be intended), the governing word is "cargo," and the buyer is bound to take the cargo, whatever its quantity may be (1). Where, however, the question is on a policy of insurance, "cargo" does not necessarily mean the whole loading. Chief Justice Tindall, in *Houghton* v. *Gilbart* (2), said: "This is a question of mercantile construction. You had better lay aside your dictionary, and appeal to the knowledge of the jury; for, after all, the dictionary is not authority" (3).

Meaning of "cargo" in policy of insurance.

Some kinds of cargo cannot be loaded so as to completely fill the ship's holds. Spaces are left, which are termed "broken stowage." If the charterer is to load a full cargo, and has the option of loading what he pleases, he cannot choose to load goods which leave broken stowage, and no others; he is bound to fill up the spaces. But this may be varied by usage (4).

Full and complete cargo.

Broken stowage.

By a contract of charter-party the charterer undertook to load "a cargo of ore, say about 2800 tons." The actual capacity of the ship was 2880 tons. The charterer loaded 2840 tons. It was held that he had satisfied his contract (5).

About.

In *Wright* v. *New Zealand Shipping Company* (6) the defendants chartered the plaintiff's vessel for a voyage to the port of L. The charter-party provided that the cargo was "to be brought and taken alongside free of expense and risk to the ship"; but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and when the ship arrived the port was crowded with vessels, about half of which belonged to the

Cargo to be taken from alongside.

(1) *Levi* v. *Berk*, 2 T.L.R. 898. (2) 7 C. and P. 701.

(3) See also *Anderson* v. *Morice*, 1 A.C. 713; *Colonial Insurance* v. *Adelaide Insurance*, 12 A.C. 128.

(4) See *Cole* v. *Meek*, 33 L.J. C.P. 183; *Southampton Steam Company* v. *Clarke*, L.R. 6 Ex. 53; *Duckett* v. *Satterfield*, L.R. 3 C.P. 227; *Morris* v. *Levison*, 1 C.P.D. 155; *Carnegie* v. *Conner*, 24 Q.B.D. 45; *Cuthbert* v. *Cumming*, 11 Ex. 405. These cases are dealt with fully in the author's work on Freight, pp. 42, 46, 47, 49, 50, 51, 62, 130, 131, 132.

(5) *Miller* v. *Borner* [1900], 1 Q.B. 691; *Morris* v. *Levison*, 1 C.P.D. 155, distinguished. See also *Furness* v. *Tennant* [1895], A.C. 40; *Steamship Isis* v. *Bakr* [1900], A.C. 340; *S.S. Heathfield* v. *Rodenacker*, 2 Com. Cas. 55; *Benson* v. *Schneider*, 7 Taunt. 273. See author's work on Freight, pp. 22, 52, 53, 54. See also *Harris* v. *Best*, 68 L.T. 76, per Lord Esher, p. 78; *Caffin* v. *Aldridge*, 64 L.J. Q.B. 736.

(6) 4 Ex. D. 165.

defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the ship before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging the other vessels lying at the port. It was held by the Court of Appeal that, in determining whether the terms of the charter-party had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account (1).

Cargo expected to arrive.

The agents of the defendants at Chili having purchased a quantity of nitrate of soda, and chartered the vessel *Precursor* to convey it to England, the defendants contracted to sell to the plaintiff "600 tons, more or less, being the entire parcel of nitrate of soda, expected to arrive at port of call per *Precursor*. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, the contract to be void." At the date of the sale the greater part of the nitrate of soda intended for shipment had been destroyed by an earthquake. The charter-party was subsequently cancelled, and notice of this fact was in due course forwarded to the plaintiff. The agents of the defendants afterwards purchased a like quantity of nitrate of soda on account of the defendants, and obtained a transfer of a second charter-party made between the vendors and the owners of the *Precursor* for the conveyance of the second parcel of nitrate of soda to England. Upon the arrival of the cargo in this country, the plaintiff laid claim to it under his contract. It was held that the contract related only to the nitrate of soda which was then expected to be carried by this particular voyage, and that upon this voyage being rendered impossible, the liability of the defendants was terminated, and the plaintiff had no claim to the cargo subsequently purchased (2).

(1) See author's work on Demurrage, pp. 51–53. See also *Postlethwaite* v. *Freeland*, 5 A.C. 599; *Aktieselkab Helios* v. *Ekman* (1897), 2 Q.B. 83.

(2) *Smith* v. *Myers*, 41 L.J. Q.B. 91. See also *Bold* v. *Rayner*, 1 M. and W. 343.

"Expected to be at a port."

By a charter-party it was mutually agreed between the plaintiff and defendant that a ship expected to be at Alexandria about the 15th December should proceed to Alexandria, or as near thereto as she could safely get, and there load a cargo. It was held that the words "expected to be at Alexandria" about the 15th December were a matter of contract, for the breach whereof an action is maintainable, also that they mean that the ship is in such a place that she may reasonably expect to be at Alexandria at the time named (1).

COLLISION

In a marine policy "collision," or "risk of collision as per clause attached," without more, refers to collision with other ships (2), or things capable of being navigated (3). But, of course, "collision with any object" is not so confined; and so, where a bill of lading exonerated the shipowners from damage arising from "collision and accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners or other servants of the company, in navigating the ship," it was held that "collision" meant every collision however caused (4). "'Collision' appears to me to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter—something navigated, and coming into contact with it. It, so to speak, imports, as it were, two things. It may be that one is active and the other is passive; but still, in one sense, they each strike the other. That does not apply to striking on the ground at the bottom" (5). Where a policy insures against "collision with any other ship or vessel, or ice, or sunken or floating wreck, or any other floating substances, or harbours, or wharves, or piers, or stages, or similar structures," it covers a striking of the upper parts of the ship; but it would be

(1) *Corkling* v. *Massey*, 28 L.T. 636. See also *Behn* v. *Burness*, 32 L.J. Q.B. 204; *Oppenheim* v. *Fraser*, 34 L.T. 524; *Ollive* v. *Barker*, 17 L.J. Ex. 21; *Bentson* v. *Taylor* (1893), 2 Q.B. 274. *Cf. Dimech* v. *Corlett*, 12 Moo. P.C. 199.

(2) Per Lindley and Lopes, L.J.J., *Reischer* v. *Borwick* [1894], 2 Q.B. 548.

(3) *Chandler* v. *Blogg* [1898], 1 Q.B. 32.

(4) *Chartered Bank of India* v. *Netherlands Steam Navigation Company*, 10 Q.B.D. 521.

(5) Per Grove, J., in *Hough* v. *Head*, 52 L.T. 861, p. 864.

equally collision "if some portion of the hull below the water-line, or even the keel itself, were to strike something under the water" (1).

CUSTOMARY. *See* ACCORDING TO THE CUSTOM OF THE PORT

Discharge of cargo "as fast as steamer can deliver, as customary," or "as fast as she can deliver," means as fast as reasonably possible, in a business sense (2). Discharge with more than customary despatch can be secured by such words as "to be discharged continuously, any custom of the port to the contrary notwithstanding" (3). "To be discharged with all despatch, as customary," means reasonable despatch having regard to the actual circumstances, *e.g.* a strike at the time of the discharge, and the custom of the port of discharge (4); and that reasonable despatch "the consignee is bound to satisfy from day to day; he cannot, by working extra hard one day, entitle himself to idle on another day; and, if he has done more than an average quantity at the beginning, he cannot relax the measure of reasonable diligence towards the end" (5). "To be loaded as customary, as per guarantee," incorporates the guarantee (6).

By themselves "the words 'to be loaded as customary,' refer only to the modes and not to the time of loading" (7).

(1) Per Mathew, J., *Union Marine Insurance* v. *Borwick* [1895], 2 Q.B. 279; *Chandler* v. *Blogg* (1898), 1 Q.B. 32; *The Normandy* (1904), P. 187. As to "in collision" in the memorandum of a policy, see *London Insurance* v. *Comp. da Moagens*, 167 U.S. 149.

(2) *Wyllie* v. *Harrison*, 13 Sess. Cas., 4th ser., 92; *Good* v. *Isaacs* (1892), 2 Q.B. 555; *The Jaederen* (1892), P. 351; *Temple* v. *Runnells* (1902), 18 T.L.R. 822; *Hulthen* v. *Stewart* (1903), A.C. 389; *Metcalfe* v. *Thompson* (1902), 18 T.L.R. 706; *The Arne* (1904), P. 154; *Hine* v. *Perkins*, 55 Fed. Rep. 906. See author's work on Demurrage, pp. 37–43.

(3) *Maclay* v. *Spillers*, 6 Com. Cas. 217.

(4) *Castlegate S.S. Company* v. *Dempsey* (1892), 1 Q.B. 854; *Lyle Company* v. *Cardiff Corporation* (1900), 2 Q.B. 638.

(5) Per FitzGibbon, L.J., *The Benwick*, cited and reported in *The Gairlock* (1899), 2 I.R. 13.

(6) *Monsen* v. *Macfarlane* (1895), 2 Q.B. 562.

(7) Per Fry, L.J., *Dunlop* v. *Balfour* (1892), 1 Q.B. 507.

DEFAULT

"Default" includes every failure by the charterer to perform his contract, unless he is prevented by superior force over which he had no control, such as stress of weather (1).

DEPART

Where an insured ship is warranted to depart on or before a given date, she must actually be out of her port of departure on that day; and it is not enough that she breaks ground and commences the homeward voyage, so as to satisfy a warranty to sail on that day (2). *See* "Leave."

DIRECTLY

"Directly" means "by the earliest opportunity": it does not necessarily mean "immediately"; it means a less protracted space than "within a reasonable time"(3).

DISPATCH

The word "dispatched" in a charter-party "means really sailing on the voyage" (4).

In *Hudson* v. *Clementson* (5) the defendants agreed by charter-party to load the plantiff's vessel at Sunderland with coke with all possible dispatch, in the customary manner, in regular turn. In an action for delay in loading according to the terms of the charter-party, it was held that evidence was not admissible to show that, according to the custom of the port of Sunderland, under such a contract the shipowner is bound to wait until a manufacturer of coke not named in the contract has supplied all ships, whose names are put down in a turn book kept by the manu-

With all possible dispatch.

(1) *Caffarini* v. *Walker*, Ir. R. 9 C.L., at p. 437.

(2) *Moir* v. *Royal Exchange Assurance Company*, 4 Camp. 84.

(3) *Duncan* v. *Topham*, 8 C.B. 225, at pp. 228, 230, 231.

(4) Per Martin, B., *Sharp* v. *Gibbs*, 1 H. and N. 806. As to despatch money at so much per hour "for all time saved," or "for every hour saved," in a discharge clause of a charter-party, see *Laing* v. *Holloway*, 3 Q.B.D. 437; *The Glendevon* (1893), P. 269; *Oakville S.S. Company* v. *Holmes*, 5 Com. Cas. 48. See author's work on Demurrage, pp. 67, 68.

(5) 25 L.J. C.P. 234.

facturer, which he has previously contracted to load with coke in the port, provided he uses reasonable dispatch and that the manufacturer's name is mentioned at the time the contract is made. *See* "Customary."

DUE DILIGENCE

"Due diligence" by owner to make ship seaworthy, connotes the obligation not only on the owner but also on his agents. A bill of lading contained a clause exempting the shipowner from liability for loss resulting from faults in navigation, provided due diligence was exercised by him to make the ship seaworthy. The ship's carpenter, who was admitted to be a competent workman, omitted to close one of the port-holes before the ship started, in consequence of which the ship was rendered unseaworthy. It was held by the Court of Appeal that, to exempt the shipowner from liability, it was not sufficient merely to show that he had personally exercised due diligence to make the vessel seaworthy, but that it must be shown that those persons whom he employed to act for him in this respect had exercised due diligence, and that, therefore, the negligence of the ship's carpenter prevented the exemption from applying and the shipowner was liable (1). A shipowner being sued on a clause in a bill of lading by which he was bound to forward the goods by steamer from London to a foreign port, the breach of duty being in not using due diligence to do so, whereby the season was lost, it was held that it was not enough that he had let the discharge and sorting of the cargo take the usual course of business at the docks where the vessel discharged, if he neglected means which might well have been used to hasten the sorting and to procure vessels for the transhipment (2).

EFFICIENT

The term "efficient," as applied in a charter-party to a ship, must be construed with reference to the several classes of work which she has from time to time to accomplish (3).

(1) *Dobell* v. *S.S. Rossmore Company* (1895), 2 Q.B. 408.

(2) *Carali* v. *Xenos*, 2 F. and F. 740. See chapter on Seaworthiness and the Harter Act.

(3) *Hogarth* v. *Miller*, 60 L.J. P.C. 1.

FORTHWITH

"I explained 'forthwith' to the jury to mean as soon as practicable" (1). "'Forthwith' is a comparative term; it means that the shipowner, at any rate, will cause no delay" (2).

FREE OF PRATIQUE

By a charter-party it was agreed that a steamer should proceed to three safe loading places between C. and M., as ordered, and proceed with cargo to H. or L. (dangers and accidents of the seas excepted). Then followed this proviso: "Should the steamer not be arrived at first loading port free of pratique and ready to load on or before a certain day, charterers have the option of cancelling or confirming this charter-party." The vessel arrived off the first loading port two days before the day named, but the sea and weather prevented any communication with the shore, and she was unable to get pratique on the day named in the charter-party, but was compelled by stress of weather to put into V., where the charterers' agent cancelled the charter-party. It was held that the arrival of the steamer at the first loading place, free of pratique, by the day named, was a condition precedent, the non-fulfilment of which entitled the charterers to exercise the option of cancelling the charter-party, and that the clause excepting dangers and accidents of the seas applied only to the voyage. It was further held that it is not misdirection for the judge to tell the jury his own opinion on the issue before them (3).

FREIGHT IN FULL FOR THE VOYAGE (4)

IMMEDIATELY. *See* DIRECTLY

"The word 'immediately,' although in strictness it excludes all mean times, yet, to make good the deeds and intents of the parties, it shall be construed such convenient

(1) Per Lord Coleridge, C.J., *Hudson* v. *Hill*, 30 L.T. 558.

(2) Per Grove, J., *ibid.* See also *Forest Oak Steam Shipping Company* v. *Richard*, 5 Com. Cas. 100; *Roberts* v. *Brett*, 11 H.L.C. 337.

(3) *Smith* v. *Dart*, 14 Q.B.D. 105.

(4) See *Sweeting* v. *Darthez*, 1854, 14 C.B. 538. See author's work on Freight, p. 138.

time as is reasonably requisite for doing the thing" (1). "The Court cannot say it absolutely excludes all mesne acts" (2), but "immediately" implies that the act to be done should be done with all convenient speed (3). In *Forest Oak S.S. Company* v. *Richard* (4), by two charter-parties of even date, a steamer was chartered to proceed on successive voyages to a port in America, and there load a cargo and proceed therewith to Rotterdam. The second charter-party contained a clause that, on the completion of the first voyage, the steamer should "proceed immediately" to fulfil that charter-party. On the completion of the first voyage, the steamer left Rotterdam and went to Cardiff to coal, and thence proceeded to America, where she arrived before the cancelling date provided by the charter-party. The charterers refused to load the steamer under the charter-party on the ground that by reason of the steamer going to Cardiff there had been a breach of the above clause. It was held that there had been no breach of the charter-party, it being the ordinary course of business for steamers proceeding from Rotterdam to America to go to Cardiff to coal. It was held also that the above clause was not a condition precedent, the breach of which would entitle the charterers to repudiate the charter-party.

LEAVE A PORT. *See also* PORT

"To leave a port," in a charter-party, does not mean that the ship is to "sail on her voyage" therefrom. "Leave," in such a connection, has no other than its ordinary signification of "getting away from." In *Van Baggen* v. *Baines* (5) a charter-party provided that a ship should "sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all March." On the 3rd March the vessel, with a part of her ballast on board, quitted the docks at Amsterdam, and on the same evening reached the entrance of the North Holland Canal. On the 31st she arrived at

(1) *Pybus* v. *Mitford*, 2 Lev. 77. (2) *R.* v. *Francis*, Ca. t. Hard. 115.
(3) Per Rolfe, B., *Thompson* v. *Gibson*, 8 M. and W. 281.
(4) 5 Com. Cas. 100. (5) 23 L.J. Ex. 213.

Alkmaar, and stayed there during the 1st and 2nd April, being engaged in taking in the remainder of her ballast. On the 3rd April she set sail and left Nieuve Diep, having completed her crew there on the 9th, and on the 17th arrived at Liverpool. It was held that the words "leave Amsterdam" did not mean "sail on her voyage from Amsterdam," and therefore that the agreement in the charter-party had been fulfilled.

Liberty to call at any Ports in any Order—to Tow and Assist

Such a clause in a charter-party as "with liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property," allows the shipowner to take on board cargo at the port of call, unless he has already contracted for the whole reach of the ship (1), but not go out of the course of the original voyage to discharge such cargo (2).

Reserving right to deviate.

The contract of affreightment commonly reserves to the shipowner the right to deviate from the voyage for the purpose of towing or assisting vessels. In *Stuart* v. *British and African Steam Navigation Company* (3), the bill of lading gave "liberty to tow and assist vessels in all situations." The ship, in the course of her voyage, called at Brass River. After discharging part of her cargo there, she went to the assistance of another vessel, the *Monrovia*, which had got aground on the bar at the mouth of the river. While endeavouring to tow the vessel off, she herself stranded, and was lost with the plaintiff's goods. It was held that the deviation was excused by the clause, although no life was in danger on the *Monrovia*. But the Court considered that some limit must be implied to the general liberty "to tow and assist," though they did not define that limit (4). In *Morris Beef Company* v. *The Wells City* (5), the American Courts held that a clause in

(1) *Caffin* v. *Aldridge* (1895), 2 Q.B. 648.
(2) *The Dunbeth* (1897), P. 133. (3) 32 L.T. 257.
(4) See *Potter* v. *Burrell* (1897), 1 Q.B. 97; *Leduc* v. *Ward*, 28 Q.B.D. 475; *Glynn* v. *Margitson* (1893), A.C. 351.
(5) 61 Fed. Rep. 857.

a bill of lading, giving the ship liberty "to tow and assist vessels in all situations," authorises her, if in the ordinary course of the voyage she falls in with another vessel in distress, to go to her assistance, and tow her to such place of safety as under the particular circumstances of the case is most reasonably accessible (1).

Such clauses, however, are more frequently found in policies of insurance, and the cases upon them have arisen out of contracts of that kind. Liberty to do something outside the voyage must be construed with reference to that, and as intended to be consistent with it. So that general liberty to call will be understood to mean at ports lying in or near the usual and direct course of the agreed voyage (2), and it will not generally warrant putting in for purposes not connected with the voyage (3). If, however, the shipment is of a part cargo only, the general liberty may justify calling at other ports, or at other parts of the named loading and discharging ports, for the purpose of taking in or discharging other cargo (4), but there must be no unnecessary delay (5). In *Leduc* v. *Ward* (6) goods were shipped at Fiume to be carried to Dunkirk. The bill of lading reserved "liberty to call at any ports in any order, and to deviate for the purpose of saving life or property." Instead of proceeding direct to Dunkirk, the ship went first to Glasgow, out of her course, and was lost, with her cargo, off the Clyde. It was held that the shipowners were not protected by the clause giving liberty to call. Lord Esher thus defined the master's duty (7): "If the only voyage mentioned" (in a bill of lading) "is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other. So here, if the description of the voyage had been merely from Fiume to Dunkirk, I think the contract would have been for a voyage on the ordinary sea track of a voyage from Fiume to Dunkirk,

General liberty of call.

Ordinary sea track.

(1) See also *The Meyer*, 74 Fed. Rep. 681.

(2) *Leduc* v. *Ward*, 20 Q.B.D. 475; Arnould, Ins. (6th), p. 472; as to coasting voyages, see *Lowry* v. *Russell*, 8 Pick. 366; Ang. Carr. 3, 179.

(3) *Hammond* v. *Reid*, 4 B. and Ald. 72; *Solly* v. *Whitmore*.

(4) *Caffin* v. *Aldridge* (1895), 2 Q.B. 366, 648.

(5) *African Merchants* v. *British and Foreign Mar. Ins. Co.*, L.R. 8 Ex. 154; *Williams* v. *Shee*, 3 Camp. 469.

(6) 20 Q.B.D. 475. (7) 20 Q.B.D. 481.

and any departure from that track, in the absence of necessity, would be a deviation. Of course, when I speak of the ordinary sea track, I do not mean an exact line, for it would necessarily vary somewhat according to circumstances; the ordinary track for sailing vessels would vary according to the wind; the ordinary track for a steamer, again, might be different from that for a sailing vessel; I mean the ordinary track of such a voyage according to a reasonable construction of the term. In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course, such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea term: it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders: it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order, and therefore the words 'in any order' are frequently added; but in any case it appears to me that the ports must be ports substantially on the course of the voyage."

Liberty to call at any ports in any order.

The opinion of Lord Esher was subsequently upheld by the House of Lords in *Glynn* v. *Margitson* (1). In that case a ship lying at Malaga, bound for Liverpool, had liberty to call at any ports in any rotation in the Mediterranean, Levant, Black Sea, or Adriatic. It was, however, held that

(1) 1893, A.C. 351. See also *White* v. *Granada S.S. Company*, 13 T.L.R. 1; *Evans* v. *Cunard S.S. Company*, 18 T.L.R. 374.

the liberty was restricted to ports which were in the course of the voyage from Malaga to Liverpool, and that a deviation to a port on the north-east coast of Spain was not justifiable. In *The Dunbeth* (1) the charter-party provided that "should frost ensue . . . after the steamer had arrived at port of loading, and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff, or Mediterranean port for United Kingdom, Continent, or Mediterranean." Gorell Barnes, J., held that there must be no unreasonable departure from the original voyage, either in filling up or in discharging the additional cargo so taken.

In *Yrazu* v. *Astral Shipping Company* (2) a contract for the carriage of animals from Buenos Ayres to Deptford gave liberty "to deviate for the purpose of saving life or property, but not to call at any port or ports before landing her live stock, *except in case of force majeure.*" The contract also contained exceptions of responsibility for loss or injury arising from *force majeure*, or from negligence or by unseaworthiness or unfitness of the ship on sailing. The ship sailed with an insufficient supply of coal, and it became necessary for the safe continuation of the voyage to put into Pernambuco for coal. This caused difficulty and delay in getting the cattle landed at Deptford, and consequent depreciation. Walton, J., held that there was an absolute undertaking by the shipowner not to call except in case of *force majeure*, unqualified by the other exceptions; and as the necessity for calling had not arisen by any casualty, but simply by the mistake at Buenos Ayres, there was no case of *force majeure*, and the shipowner was responsible.

MONTH

Month.

The primary meaning of "month" in legal documents is "lunar month," and there is no general exception making it mean "calendar month" in commercial documents. It can only bear that meaning where, according to the ordinary rules of construction, a secondary meaning can be admitted. Where a contract is to be performed within or at the ex-

(1) (1897), P. 133. (2) 9 Com. Cas. 100.

piration of a month, the general presumption of law is that the parties meant a lunar, not a calendar month (1). But if the context shows that a calendar month was intended, the Court may adopt that construction (2). And in like manner the circumstances in which the contract was made, or proof of some custom in the place where, or the trade with reference to which it was made, may rebut the presumption, and show that a calendar month was intended (3).

NAVIGATION. *See* PERILS OF THE SEA (4)

"Navigation" is "the science or art of conducting a ship from one place to another. This includes the supply of necessary implements and skilful mariners. The instruments are useless without the skilful mariners, and, conversely, navigation includes two things—the supply of the instruments or organs of the ship, and the living instruments or seamen. If either of these is wanting by the negligence of the owner, or of those for whom he is responsible, there is improper navigation" (5).

"Cases have been decided that the word 'navigation,' for some purposes includes a period when the ship is not in motion; as, for instance, when she is at anchor" (6).

Canting over in port is a "danger or accident of navigation" (7); so damage "caused by the bad navigation of another ship, is a 'danger of navigation.' Where, however, the loss is brought about by the shipowner's own servants, that is not a 'danger of navigation,' for the danger there is a danger arising from the shipowner having employed inefficient or negligent servants" (8).

"Faults or errors in navigation" primarily applies

(1) Per Cur, *Simpson* v. *Margitson*, 11 Q.B. 23, 31; *Bruner* v. *Moore* [1904], 1 Ch. 305, per Farwell, J.

(2) *Lang* v. *Gale*, 1 M. and S. 111.

(3) Per Lord Denman, C.J., *Simpson* v. *Margitson*, 11 Q.B. 23, 32. See the author's work on Freight, p. 27.

(4) See author's work on Bills of Lading.

(5) Per Fry, L.J., *The Warkworth*, 53 L.J. P. 66. See also *Good* v. *London S.S. Association*, 6 C.P. 563; *Carmichael* v. *Liverpool Sailing Ship Association*, 19 Q.B.D. 242.

(6) Per Denman, J., *Hayn* v. *Culliford*, 3 C.P.D. 417.

(7) *Laurie* v. *Douglas*, 15 M. and W. 746.

(8) Per Esher, M.R., *Garston Company* v. *Hickie*, 18 Q.B.D. 17.

"to faults or errors in sailing the vessel during the voyage" (1).

"'Improper navigation,' within the meaning of this deed (one between owners for their mutual indemnity), is something improperly done with the ship or part of the ship in the course of the voyage . . . an omission properly to navigate the ship" (2); accordingly it was there held that damage to cargo from water, caused by the bilge-cock and sea-cock being negligently left open, was damage from "improper navigation."

By the rules of a mutual insurance association, the plaintiffs, who had entered their ship on the books of the association, were entitled to protection in respect of loss of, or damage to, any goods or merchandise on board the ship caused by the "improper navigation" of the ship. A cargo of wheat was loaded on board the ship, and on arrival at its destination it was found that the wheat was tainted with the smell of paraffin, and it was rejected by the consignee. The smell arose from a cargo of liquid composition, carried in the previous voyage, which had leaked into the hold and saturated the timber boards and ceiling of the ship. It was held that the damage to the cargo was not caused by "improper navigation" of the ship within the meaning of the rules, and that the plaintiffs were not entitled to recover the loss (3).

NEARLY AS POSSIBLE

"As nearly as possible," *e.g.* in a charter-party "as nearly as possible a steamer a month" is only an approximate phrase (4). In *Potter* v. *Burrell*, under a charter for a series of ships "as nearly as possible a steamer a month," to be loaded in a fixed time; owing to excepted perils, two steamers arrived at the same time, and could not, with the resources of the port, be loaded in the fixed time.

(1) Per Kay, L.J., *Dobell* v. *S.S. Rossmore Company* (1895), 2 Q.B. 408. See also *The Carrion Park*, 59 L.J. P. 74; *The Southgate* (1893), P. 329; *The Glenochil* (1896), P. 10.

(2) Per Willes, J., *Good* v. *London Steamship Owners' Association*, 6 C.P. 569.

(3) *Canada Shipping Company* v. *British Shipowners' Association*, 61 L.T. 312. See also author's work on Bills of Lading.

(4) Per Lindley, L.J., *Potter* v. *Burrell*, 66 L.J. Q.B. 63.

The Court of Appeal held that, as the shipowner was not liable for the delay, the charterer was not excused by it.

PORT. *See* ACCORDING TO CUSTOM OF PORT, LEAVE A PORT.

Meaning of.

The word "port" in a charter-party must be construed by reference to the meaning commonly given to it by merchants and shippers. The extent of the particular port, as understood by them, is not necessarily or ordinarily determined by its legal definition for fiscal or like purposes, or even by geographical considerations. Its extent, in a commercial sense, is rather shown by such considerations as the safety afforded for shipping, the conveniences for loading and unloading, the usages of the place with regard to anchoring, loading, and discharging, and the area over which those matters are regulated by the authorities having jurisdiction in the port. Ports and havens are not merely geographical expressions. They are places appointed by the Crown "for persons and merchandise to pass into and out of the realm," and at such places only is it lawful for ships to load and discharge cargo. The assignment of such places to be "the inlets and gates" of the realm is, and always has been, a branch of the prerogative resting, as Blackstone remarks, partly upon a fiscal foundation, in order to secure the King's marine revenue. Their limits and bounds are necessarily defined by the authority which creates them, and the area embraced within those limits constitutes the port (1).

It seems very difficult to give an exact definition of what constitutes a "port" for loading or discharging. The meaning of the word "port" was much discussed in *Garston* v. *Hickie* (2), where the vessel had been loaded at Cardiff, had left the docks with the intention of proceeding at once to sea, and had got beyond the artificial channel mentioned in *Roelandts* v. *Harrison* (3). Brett, M.R.,

(1) Per Lush, J., in *Nicholson* v. *Williams*, L.R. 6 Q.B. 632. See also the judgments delivered by the Court of Appeal in *Leonis S.S. Company* v. *Rank* (1908), 1 K.B. 499, as to "arrival at place of loading."

(2) 15 Q.B.D. 580. See also *Hunter* v. *N. Mar. Ins. Co.*, 13 A.C. 717.

(3) 23 L.J. Ex. 169.

said: "By the word 'port' the parties intend the port as commonly understood by all persons who are using it as a port, *i.e.* for sailing to or from it with goods or merchandise. What persons are they? Shippers of goods, charterers of vessels, and shipowners." His lordship then said the port was not generally "the legal port" as defined by Acts of Parliament, but "a place of safety for the ship and the goods whilst the goods are being loaded and unloaded." Any particular spot at which loading and unloading took place might be safely inferred to be within "the port," as understood by the parties; as, although the place of loading and unloading of goods was not always the exact measure of a port, it was a safe rule to say that the loading and unloading took place within the port. Beyond the place of loading and unloading, the port would extend to any further spaces over which the port authorities were in the habit of exercising "port discipline."

In *The General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (1), the Court had to decide the extent of the port of London for pilotage purposes. For this purpose Baron Martin considered the meaning of the word "port" generally, and Byles, J., in delivering the judgment of the Court of Exchequer Chamber, said (2): "The passage from Lord Hale, *De Portibus Maris* (3), shows that the limits of a port may depend on the existence of wharves. quays, houses, buildings, and other conveniences. They may, accordingly, from time to time vary and increase with the increase of population and of buildings. Lord Hale further says: 'The port of London anciently extended to Greenwich in the time of Edward I., and Gravesend is a member of it.' The extent of a port, therefore (4), after the lapse of years, may become a question of fact."

At Laguna de los Padres, a place on the coast of Buenos Ayres, there was no artificial port, but merely a village, with

(1) L.R. 3 Ex. 330, 345.
(2) L.R. 4 Ex. 238, 245. (3) Ch. 2, at p. 46.
(4) With regard to the distinction between the commercial and the Custom House limits of a port, see *Hull Dock Company* v. *Browne*, 2 B. and Ald. 43; *Nicholson* v. *Williams*, L.R. 6 Q.B. 632; *Price* v. *Livingstone*, 9 Q.B.D. 679; *Garston S.S. Company* v. *Hickie*, 15 Q.B.D. 580; *Hunter* v. *Northern Marine Insurance Company*, A.C. 717.

a wooden jetty, and the vessels calling there had to anchor about a quarter of a mile from the shore in the roadstead, where they were loaded by means of lighters and small craft. The roadstead was protected by natural headlands on either side, which formed a kind of bay, and the anchorage was good, but the place was rather open to the east and north-east. There was a regular track between it and Buenos Ayres. It was held that it was a port of loading, to which the vessel was at liberty to go (1).

In *Cockey* v. *Atkinson* (2) an open roadstead was held to be a port of loading. In the *Alhambra* (3) it was held that Lowestoft Roads are not a part of the port of Lowestoft (4).

Safe port.

Lush, J., in *Harrower* v. *Hutchinson* (5) said: "The word port or ports of loading, I think, must be read in a liberal sense; they must be taken to mean not merely those places which are technically called ports, but all places to which ships may be accustomed to resort for the purpose of taking in cargo. The port must be safe for the particular ship laden as she is during the time which will be occupied by her discharge; and where a safe port has been stipulated for, the charterer is not entitled to have the unloading done partly outside and partly inside the port; therefore it must be one into which she can safely go and lie with all her cargo."

When it is agreed by charter-party that a ship shall proceed to a "safe port, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound, if ordered to a port which can only be entered by first discharging part of the cargo, to allow such an amount to be taken out as will enable her to enter the port, even if the lighterage can be done in a place and under circumstances which will not expose the vessel to danger; and in such a case evidence that the custom of the port is to lighten vessels, when necessary, before entering the port, is not admissible (6). The port must be one

(1) *Harrower* v. *Hutchinson*, L.R. 4 Q.B. 523. (2) 2 B. and A. 460.
(3) 6 P.D. 68; *Sea Insurance Company* v. *Gavin*, 2 Dow. and C. 129.
(4) See also *Caffarini* v. *Walker*, Ir. R. 10 C.L. 250.
(5) L.R. 4 Q.B. 534.
(6) *The Alhambra*, 6 P.D. 68. But see *Hillstrom* v. *Gibson*, 8 Sess. Cas. (3rd ser.) 263; *Capper* v. *Wallace*, 5 Q.B.D. 163; *Charpentier* v. *Dunn*, 15 Sc. L.R. 726.

Physically safe.

that is physically safe; and this is a question of fact to be decided by the jury, having regard to the particular vessel and the nature of the work to be done (1).

Manchester was held not to be a safe port for a ship which would have to be dismantled in order to pass Runcorn Bridge, the heads of her lower main and mizzen masts being higher than the limit allowed for passing the bridge (2).

Safe port "as ordered."

Where it was provided that the chartered vessel, being loaded with her cargo, should "proceed to the Mersey (or so near thereto as she may safely get) and deliver the same at any safe berth, as ordered, on arrival in the dock at Garston," it was held that the carrying voyage ended, and the obligation of the charterer to take delivery commenced, not on the arrival of the vessel in the dock, but on her arrival at a berth, as ordered (3). Lord Esher, M.R., said: "Charter-parties often state that the voyage is to end when the ship arrives at a particular port, or part of a river, or in a certain dock; and *Nelson* v. *Dahl* (4) shows how these charter-parties are to be construed, but it does not deal with a charter-party which describes the end of the voyage by reference to an option to be exercised by the charterer. In the present case the ship was to go to the Mersey and to deliver the goods at any safe berth, as ordered, on arrival in the dock of Garston. Now, supposing the berths in the Garston Dock had been numbered, and that the contract had said that the ship was to deliver the goods at, for example, No. 1 berth in the Garston Dock, *Nelson* v. *Dahl* (5) shows what the construction of such a clause would be, namely, that the voyage would not be at an end until the ship had arrived, and was ready to deliver the goods at No. 1 berth. But does not the contract say that which is equivalent to what I have supposed? When the contract says that the ship is to deliver the goods 'at any safe berth, as ordered,' does not that give the plaintiffs the right to fix the place where the carrying voyage is to end? In my opinion, apart altogether from authority, it does. In *Tapscott* v. *Balfour* (6) it was laid

(1) *Smith* v. *Dart*, 14 Q.B.D. 105.
(2) *Goodbody* v. *Balfour*, 5 Com. Cas. 59. See also *Mencke* v. *Cargo of Sugar*, 187 U.S. 248.
(3) *Tharsis Sulphur Company* v. *Morel* (1891), 2 Q.B. 647.
(4) 6 A.C. 38. (5) 6 A.C. 38. (6) 8 C.P. 46.

down that, if delivery was to be at one of two or more places 'as ordered,' the moment the charterer names the place he fixes the end of the voyage, as much and with the same consequences as if the place had been named in the charter-party. . . . The words 'as ordered' would have no meaning unless they gave the charterer an option to settle the end of the voyage. In that case the option was to name a dock; here it is to name a place in a dock: but it is such a place that, when the charterer has exercised his option, the place named by him, if it had been named in the charter-party, would fix the end of the voyage. . . . To my mind *Murphy* v. *Coffin* (1) follows and adopts *Tapscott* v. *Balfour* (2) and was rightly decided."

Master not bound to go to port where vessel must be lightened.

In *Graham* v. *Mervanji Nusserwanji* (3) it was held that where a vessel is chartered to load a full and complete cargo, and being so loaded to proceed therewith to a "safe port, or so near thereto as she may safely get, and deliver the same, always afloat," the master is not bound to sign bills of lading for, or to sail to, a port where the vessel cannot, by reason of her draught of water, lie and discharge, "always afloat," without being previously lightened, even if the costs of the requisite lightening would, by the charter-party, fall on the charterers.

A ship was ordered to discharge at Gloucester, but she found that she was too deep to go beyond Sharpness, at the entrance of the canal leading to Gloucester. The charterers required that she should lighten and proceed up the canal; and they gave proof of a custom for vessels bound to Gloucester to lighten at Sharpness. The master refused to go on, and discharged the whole cargo at Sharpness. It was found that Sharpness and Gloucester were, in a commercial sense, distinct ports. It was held that Gloucester was not a safe port for the vessel; and that the charterers could not claim damages against the shipowners (4).

Port need not be physically safe at the time of the order or on arrival.

Where there is no express stipulation on the point, it is not necessary that the port named should be physically safe at the very time of the order being given or of the

(1) 12 Q.B.D. 91. (2) 8 C.P. 46. (3) I.L.R. 5 Bomb. 539.
(4) *Reynolds* v. *Tomlinson* (1896), 1 Q.B. 586. See also *Treglia* v. *Smith's Timber Company*, 1 Com. Cas. 360; *The Alhambra*, 6 P.D. 68.

vessel's arrival. A temporary obstacle does not make it unsafe (1). But the port must be politically safe at the time when it is named by the charterer (2). But a mere probability that the port named by the charterer may be closed before the vessel will get there is not enough to render it unsafe (3). Blackburn, J., said in *Ogden* v. *Graham* (4): "In the absence of all authority bearing on the matter, I am of opinion that, under the terms of a charter-party like the present, the charterer is bound to name a place which, at the time he names it, is one into which the ship can get; and that although the ship can physically get into it as far as navigation and what may be called the natural incidents are concerned, yet, if that would be at the certain risk of confiscation, then the place is not a safe port. If at the time the place had been named the port had been open, or if that particular port had been mentioned in the contract itself, and the port had been found closed before the ship could enter, then the shipowner would have been saved from being obliged to go in by the clause of exception as to restraint of princes and rulers; but he would have had no right of action against the charterer for being prevented from earning the freight which he could not earn" (5).

Master signing bills of lading for a port named, though not safe.

Where the orders for the port of discharge are given at the time of loading, and bills of lading are signed by the master making the goods deliverable at the port named, the shipowner cannot afterwards object that it is not a safe port, but he may be entitled to claim damages in respect of losses which he may incur owing to the port not being a safe one (6).

POSSIBLE

A duty to do a thing "if possible" means, generally, if reasonably possible in a business sense (7).

(1) *Parker* v. *Winlow*, 27 L.J. Q.B. 49; *Allen* v. *Coltart*, 11 Q.B.D. 782.
(2) *Ogden* v. *Graham*, 31 L.J. Q.B. 26.
(3) *The Teutonia*, L.R. 4 P.C. 171, 181. (4) 31 L.J. Q.B., p. 29.
(5) See also *Rae* v. *Hackett*, 13 L.J. Ex. 216.
(6) *Capper* v. *Wallace*, 5 Q.B.D. 163.
(7) Per Esher, M.R., *Assicurasioni Generali* v. *Bessie Morris Company* (1892), 2 Q.B. 652. See also *Shepherd* v. *Kottgen*, 2 C.P.D. 589. As to "if possible," see *Wilson* v. *Kynock*, W.N. 1877, 164.

PROMPT DESPATCH

Where a charter-party contains a clause "prompt despatch in loading," it would seem that delay, even though caused by an insufficiency of cargo at the port of loading, is a breach of an obligation for prompt despatch (1). A contract to give "prompt despatch" has been held in the United States to require the charterer to have a berth ready at once (2).

READY TO LOAD

The vessel will not be "ready to load" within the meaning of such a clause, unless she be completely ready and discharged in all her holds, so as to give the charterer complete control of every portion of the ship available for cargo. Thus where the cancelling clause stipulated that a steamer should be "ready to load on or before the 31st March," it was held that it meant that in working hours of the 31st March the steamer was to have all her holds discharged of outward cargo and ready, and that it was not enough that some of her holds were ready (3). But the condition does not require that the ship shall be in a loading berth. Thus in *Hick* v. *Tweedy* (4), where the defendants, by letter, undertook to load the plaintiff's steamer at Odessa, but inserted a clause "charterers having the option of cancelling, if she is not ready to receive cargo by 12th December next," Charles, J., held that, as the ship reached Odessa, and, so far as she was concerned, was ready to load before the 12th December, the charterers could not refuse to load her. The charterers proved a custom of the port of Odessa that a ship is not considered ready to receive cargo, or ready to load, until she is in berth alongside the quay; and it was admitted that the steamer did not, in consequence of the crowded state of the port, get alongside the quay until some days after the 12th December, yet it was held that the language

(1) *Elliott* v. *Lord*, 48 L.T. 452.

(2) *Ten thousand and eighty-two oak ties* (1898), 87 Fed. Rep. 935.

(3) *Groves* v. *Volkart*, 1 C. and E. 309. See *Vaughan* v. *Campbell*, 2 T.L.R. 33.

(4) 63 L.T. 765. See *Smith* v. *Dart*, 54 L.J. Q.B. 121, referred to under DEFINITIONS, "Free of Pratique."

of the particular contract prevented the application of the custom at Odessa.

Ready "in all May." Sail "in all June."

Where a ship was to be "ready to receive cargo in all May, guaranteed by the owners to sail in all June," it was held that the readiness to receive a cargo in all May was a condition precedent to the plaintiff's right to recover against the defendants for not loading a full cargo (1).

The ship must be legally able to communicate with the shore. So that where charterers had the option of cancelling, "if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th October," and she arrived at 11 P.M. on 10th October, but no one could leave the ship or come on board until after the health officer had visited her on the following morning, it was held that she was not ready in time. The health regulations disqualified her (2). But the condition does not require that the holds shall have been prepared for the particular cargo. In *Vaughan* v. *Campbell* (3) it was held that the condition was complied with, although her holds were not lined in the manner usual for a wheat or flour cargo, which the charterer was about to ship (4).

Under a charter-party in the ordinary form, the shipowner is bound to have his ship at the port of loading in the condition contemplated by the charter-party, ready to receive a cargo. If he is prevented by any unforeseen cause, he would be liable on his contract. So in the case of the charterer not loading within the stipulated time. If he fails to do so through any accident, that is his misfortune, and he is liable to the shipowner. Both parties, therefore, must be ready, otherwise they cannot maintain an action. Where neither party is ready, because they are both prevented by a superior power, neither can maintain any action for the unreadiness of the other (5).

"Ready to receive cargo."

The words "ready to receive cargo," inserted in a shipping order, mean that the ship, on the day named in the

(1) *Oliver* v. *Fielden*, 18 L.J. Ex. 353; *Shadforth* v. *Higgin*, 3 Camp. 385. See also *Smith* v. *Dart*, 14 Q.B.D. 105; *Deffel* v. *Brocklebank*, 3 Bligh 561; *Balley* v. *De Arroyave*, A. and E. 919; *Seeger* v. *Duthie*, 8 C.B. N.S. 45.

(2) *The Austin Friars*, 71 L.T. 27; *White* v. *S.S. Winchester Company*, 25 Sc. L.R. 342.

(3) 2 T.L.R. 33.

(4) See also *Grampian S.S. Company* v. *Carver*, 9 T.L.R. 210.

(5) *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; *Cunningham* v. *Dunn*, 3 C.P.D. 443.

shipping order, shall be ready to receive a full cargo, by whomsoever offered, and not merely ready to receive the quantum of cargo mentioned in the shipping order (1).

SAILING

Meaning of.

"It is clear that a warranty to 'sail,' without the word 'from,' is not complied with by the vessel's raising her anchor, getting under sail, and moving onwards, unless at the time of the performance of these acts she has everything ready for the performance of the voyage, and such acts are done at the commencement of it, nothing remaining to be done afterwards" (2). "'Sail' is a technical word, and means 'start on voyage'" (3). "A vessel has sailed the moment she is unmoored and got under way, in complete preparation for the voyage, with the purpose of proceeding to sea without further delay at the port of departure. Lord Mansfield said: 'To constitute a sailing under this warranty, the vessel at the time of sailing must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were possible' (4),—referring, probably, to her being ready so far as her preparations and equipments for the voyage are concerned" (5). Therefore, where a vessel, being fully equipped, left her moorings with the intention of proceeding to sea, she was held to have then sailed, although, owing to the wind, she stayed for two days about half a mile nearer the mouth of the harbour (6); otherwise, where the movement from the mooring towards the mouth of the harbour was merely for the more convenient sailing at a later date (7), or where the vessel starts but, being undermanned, is compelled to put back (8), the condition of sailing on or before a particular date will not be satisfied unless the ship has definitely

(1) *Taylor* v. *Brooke*, 1 Bom. H.C.R. App. 48.
(2) Per Abbott, C.J., *Lang* v. *Anderson*, 3 B. and C. 499.
(3) Per Byles, J., *Barker* v. *M'Andrew*, 34 L.J. C.P. 195. See also *Thompson* v. *Gillespie*, 24 L.J. Q.B. 340.
(4) *Thellusson* v. *Staples*, 1 Doug. 366, *n.*
(5) Phillips on Insurance, s. 772, cited and adopted by Mathew, J., *Sea Insurance* v. *Blogg* (1898), 1 Q.B. 27.
(6) *Fisher* v. *Cochrane*, 4 L.J. Ex. 328.
(7) *Sea Insurance* v. *Blogg* (1898), 1 Q.B. 27.
(8) *Sharp* v. *Gibbs*, 1 H and N. 801.

left the dock or moorings at which she was lying ready for her voyage, and with the intention of those in charge of proceeding upon it forthwith. Thus where a ship laden and fit for sea left the harbour, and it was intended that she should proceed as soon as her clearances were completed and bills of lading signed, it was held that, as these things had not been done, she had not sailed (1). An agreement "to sail," without more, means to sail at once, *i.e.* within a reasonable time, "having regard to the weather and the possibility of moving the ship" (2). *See* "Depart," "Dispatch," "Leave."

In determining the point at which a vessel has "finally sailed," the circumstances of the particular port of loading must be considered; and where the vessel was wrecked after having her clearances on board, and had left the dock gates and had reached a ship canal between high and low water, where she was subject to certain regulations under a local Act, and where she was liable to be stopped by the harbour master, it was held that she had not finally sailed within the meaning of the charter-party (3). *See* "Depart."

When a ship leaves her port, ready for her voyage and for the purpose of proceeding on her voyage, without intending to come back, she must be taken to have "finally sailed," although she may afterwards be driven back by stress of weather (4). Whether she has really sailed or not from a port must be ascertained by reference to the popular or general sense of the name used in describing the place (5).

"SO NEAR THERETO AS SHE CAN SAFELY GET"

"So near thereto as she can safely get."

"It appears from *Parker* v. *Winlow* (6), *Bastifell* v. *Lloyd* (7), and *Dahl* v. *Nelson* (8), that when the charter-party

(1) *Thompson* v. *Gillespie*, 24 L.J. Q.B. 340; *Hudson* v. *Bilton*, 26 L.J. Q.B. 27; *Ridsdale* v. *Newnham*, 3 M. and S. 456.

(2) Per Esher, M.R., *Oriental S.S. Company* v. *Tylor* (1893), 2 Q.B. 518. See author's work on Freight, pp. 29–31.

(3) *Roelandts* v. *Harrison*, 23 L.J. Ex. 169. See also the author's work on Freight, pp. 28–33. See also *Garston S.S. Company* v. *Hickie*, 15 Q.B.D. 580; *Valente* v. *Gibbs*, 26 L.J. C.P. 229; *Moir* v. *Royal Exchange Assurance Company*, 3 M. and S. 461.

(4) *Price* v. *Livingstone*, 53 L.J. Q.B. 118.

(5) *Lang* v. *Anderson*, 3 B. and C. 495; *Van Baggen* v. *Baines*, 23 L.J. Ex. 213; *Sharp* v. *Gibbs*, 1 H. and N. 801.

(6) 27 L.J. Q.B. 49. (7) 31 L.J. Ex. 413. (8) 50 L.J. Ch. 411.

provides that a ship shall go to a harbour named, or 'as near thereto as she can safely get,' the primary object is to get to the place named, and the alternative condition does not arise unless the cause which prevents the immediate arrival of the ship at the place named is such that it cannot be got rid of, by the shipowner, by reasonable means and within a reasonable time, having regard to the nature and object of the voyage; and, further, that if the cause of the detention be the arrival of the vessel during the low tides, her having to wait for the tides to increase is one of the ordinary incidents of navigation, and the shipowner must submit to the delay so occasioned" (1).

It has been said that the meaning of this "must be that she should get within the ambit of the port, though she may not be able to enter it" (2). But this is not the natural effect of the words; and the later authorities seem to show that the shipowner's undertaking may be satisfied although the ship has not come within, or even near, the port, if she is prevented from doing so by an obstruction of a "permanent character" (3). It is now established that a shipowner may have satisfied his undertaking to get as near as he safely can, although the obstacle which prevents his going further may not be a physical one, nor one that is absolutely permanent. In each case the question is whether the impediment could "be overcome by the shipowner by any reasonable means except within such a time as, having regard to the objects of the adventure of both charterer and shipowner, was, as a matter of business, wholly unreasonable" (4). It has also been held that the stipulation to proceed to such a place or "so near thereto as the vessel can safely get," necessarily comprehends her safety also in

(1) Per North, J., *Horsley* v. *Price*, 52 L.J. Q.B., p. 605.

(2) Per Lord Campbell in *Schilizzi* v. *Derry*, 24 L.J. Q.B. 197, adopted by the Court in *Metcalfe* v. *Britannia Ironworks Company*, 1 Q.B.D. 613.

(3) *Nelson* v. *Dahl*, 12 Ch. D. 568; *Capper* v. *Wallace*, 5 Q.B.D. 163; *Hayton* v. *Irwin*, 5 C.P.D. 130.

(4) Per Brett, L.J., in *Nelson* v. *Dahl*, 12 Ch. D. 568, at p. 593. *Cf. Castel* v. *Treckman*, 1 C. and E. 276; *Hillstrom* v. *Gibson*, 8 Sess. Cas. (3rd ser.) 463; *Allen* v. *Coltart*, 11 Q.B.D. 784; *Shield* v. *Wilkins*, 19 L.J. Ex. 238; *The Alhambra*, 6 P.D. 68; *Carbon Slate Company* v. *Ennis*, 114 Fed. Rep. 269; *Tweedie Trading Company* v. *New York, etc., Company*, 127 Fed. Rep. 278; *Reynolds* v. *Tomlinson* (1896), 1 Q.B. 586; *Treglia* v. *Smith's Timber Company*, 1 Com. Cas. 360; *Nobel's Explosives Company* v. *Jenkins* (1896), 2 Q.B. 326; *Bremner* v. *Burrell*, 4 Ct. of Sess. Cas. (4th ser.) 934.

coming away when loaded, and justifies the vessel in crossing the bar at the harbour entrance with what cargo she can carry in doing so, and lying-to outside for the rest of the cargo (1).

Temporary obstacles, causing delays which may be regarded as contemplated incidents of the voyage, will not excuse the owner. He must wait until they are removed and then proceed (2). The obstacle need not be of a physical kind. It may, for instance, arise from a refusal of those who control the access to the agreed place. Lord Blackburn said, in *Nelson* v. *Dahl* (3): "The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could only do so by waiting an unreasonable time. It is quite true that a question of 'reasonable or unreasonable' must always be a question of more or less, and therefore of uncertainty, but that, I think, cannot be helped. I do not pretend to lay down any precise rules as to what is reasonable or what is not. I think the main elements to be considered are, what would be the effect on the object of the contract, and the damage to each party caused by the delay ; and if the result be to lead those who have to decide the question to think that it is absurd to suppose that two commercial men, entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable." The clause "so near thereto as she can safely get" refers to the safety of the ship herself, not to the safety of the cargo (4).

Relates to the ship, not to the cargo.

STRIKES

"There is no authority which gives a legal definition of 'strike,' but I conceive the word means a refusal by the whole body of workmen to work for their employers, in consequence of either a refusal by the employers of the workmen's demand for an increase of wages, or of a refusal

(1) *Shield* v. *Wilkins*, 19 L.J. Ex. 238. See the author's work on Demurrage, pp. 23–30, where these cases are fully dealt with.

(2) *Parker* v. *Winlow*, 27 L.J. Q.B. 49; *Bastifell* v. *Lloyd*, 31 L.J. Ex. 413.

(3) 6 A.C., at p. 54.

(4) *Nobel's Explosives Company* v. *Jenkins* (1896), 2 Q.B. 326.

by the workmen to accept a diminution of wages when proposed by their employers" (1), or *semble*, such a refusal in consequence of any dispute between masters and men relating to the employment: in short, "a 'strike' is properly defined as a simultaneous cessation of work on the part of the workmen" (2). An excuse for delay in fulfilling a contract on the ground of a "strike" by workmen means a strike against the employer, not a mere refusal to work because an infectious disease is prevalent, or the weather is hot or wet, or such-like excuse (3). The exception "strikes or lock-outs" covers refusals of men or masters to carry on work or business by reason of and incidental to labour disputes (4).

Usual Colliery Guarantee

This phrase in a charter-party, and as determining the time for the commencement of loading, means the guarantee in use at the place where the contract is to be performed (5), such a colliery guarantee being an engagement by a colliery proprietor as to the time in which and the conditions under which he will load a ship with coal.

Usual Despatch

"Where charterers contracted to load a cargo of coals on board 'with usual despatch,' it was held that they were bound to load the vessel with the usual despatch of persons who have a cargo ready for loading at the port, and that they were liable for a delay caused by a severe frost, which rendered unnavigable the canal along which the coals were to be brought" (6).

(1) Per Kelly, C.B., *King* v. *Parker*, 34 L.T. 889.

(2) Per Hannen, J., *Farrer* v. *Close*, L.R. 4 Q.B. 612.

(3) *Stephens* v. *Harris*, 57 L.J. Q.B. 203. See author's work on Demurrage.

(4) *Richardson* v. *Samuel* (1898), 1 Q.B., 261, at pp. 267, 268. See also *Bulman* v. *Fenwick* (1894), 1 Q.B., at p. 185; *The Alne Holme* (1893), p. 173. As to the phrase "general strike," see *Aktieselskabet Shakespeare* v. *Ekman* (1902), 18 T.L.R. 608.

(5) *Shamrock S.S. Company* v. *Storey*, 81 L.T. 413.

(6) 1 Maude and P. 317, citing *Kearon* v. *Pearsons*, 7 H. and N. 386. See also *Adams* v. *Royal Mail Steam Packet Company*, 5 C.B. N.S. 492. See author's work on Demurrage, pp. 30–36.

USUAL AND CUSTOMARY MANNER

"Where, by the terms of a charter-party, the ship is to deliver the cargo 'in the usual and customary manner,' the obligation which attaches is only that the merchant and shipowner shall each use reasonable despatch in performing his part, and there is no implied contract that the discharge shall at all events be performed in the time usually occupied at the particular port. Therefore, when, owing to a threatened bombardment, the authorities at the port of discharge refused for several days to allow the discharge of cargo to proceed, so that during those days neither party to the contract could perform his part of the contract, it was held that the loss from delay must fall on the shipowner" (1).

"Load in the usual and customary manner" seems to apply only to the mode of loading when the vessel has arrived at the loading berth, and to have no reference to a detention outside the loading place (2).

(1) 1 Maude and P. 409, citing *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; *Cunningham* v. *Dunn*, 3 C.P.D. 443. See also *Postlethwaite* v. *Freeland*, 5 A.C. 599; *Good* v. *Isaacs* (1892), 2 Q.B. 555; *The Jaederen* (1892), P. 351. See author's work on Demurrage, pp. 36–43.

(2) 1 Maude and P. 408, citing *Tapscott* v. *Balfour*, 8 C.P. 46; per Pollock, C.B., *Lawson* v. *Burness*, H. and C. 400; per Brett, L.J., *Nelson* v. *Dahl*, 12 Ch. D. 588. See also *Kay* v. *Field*, 10 Q.B.D. 241; *The Aine Holme* (1893), P. 173.

CHAPTER II

THE DIFFERENT CLASSES OF CHARTER-PARTIES

A CHARTER-PARTY is an instrument by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. It is an instrument of frequent use and great importance among merchants. No special form is necessary, and it is quite common to introduce into it any stipulations or provisions which the peculiar character of the voyage or the purposes of the parties may require. "The term charter-party is generally understood to be a corruption of the Latin words *charta partita*; the two parts of this and other instruments being usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should fit and tally with the other, as evidence of their original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties. With the same design, indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of indenture. This practice of decision, however, has long been disused, and that of indentation has become a mere form" (1).

Definition of charter-party.

Origin of.

Affreightment is a contract by which a shipowner undertakes to carry goods in his ship for reward. The person for whom the goods are carried is called the *freighter*, and the sum which he pays for their carriage is called the *freight*. The contract may be made (*a*) between the shipowner and one person who hires the use of the ship for the purpose of carrying his own goods or those of other persons, or (*b*)

Affreightment.

(1) Abbott, 5th edit., p. 113.

between the shipowner and each of a number of persons who ship goods in that particular ship. In the former case the contract is generally expressed in a *charter-party*, and
Chartered ship. the ship is called a *chartered* ship, but the contract of affreightment does not require a charter-party to be made;
General ship. in the latter the ship is called a *general* ship, and the contract is generally expressed in writing, and called a
Bill of lading. *bill of lading*. The person who hires the ship, or under-
Charterer. takes to provide a full cargo, is termed the *charterer*.

What is a bill of lading? A bill of lading is an instrument which has had a recognised existence in commerce and commercial law for certainly two hundred years, and embodies an undertaking by a shipowner to carry the goods specified in it on board his ship from one port to another on payment by the shipper of a specified sum. It differs from a charter-party in that it is required and given for a single article (*i.e.* parcel) or more laden on board a ship that has sundry merchandise shipped for sundry accounts; whereas a charter-party is a contract for a whole ship, or some principal part thereof. The bill of lading is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract.

A negotiable instrument. A bill of lading is a quasi-negotiable document transferable by indorsement, and is made singly, or in sets of two, three, four, or six, or even eight, and is signed by the master or purser of the vessel, or by an agent or clerk of the owners or charterers, or by a broker *per procuration*; and in such cases the person so signing must be authorised to do so either expressly or impliedly. Upon the bill of lading being signed, each one of the set becomes an original, and purports to be an acknowledgment that the goods specified in it have been received on board of the vessel in good order and condition, and that the same will be carried from the port of loading to, and delivered at the port of discharge, in like good order and condition to A.B. or order or assigns, subject to the several conditions and exceptions set forth in the bill of lading (1). Upon the goods being received on board, the master, or person acting for him (usually the mate), gives a receipt for the same, and afterwards, in exchange for this receipt, the bill of lading is handed to the holder of the

(1) *Petrocochino* v. *Bott*, 43 L.J. C.P. 214; *Caldwell* v. *Ball*, 1 T.R. 213.

receipt, which, being binding on the owners, should always be obtained before the bills of lading are signed (1).

Voyage and time charters.

Contracts of charter-party are commercially known as "voyage" or "time" charters. The latter contains more stipulations than the first class, and, being more complicated, frequently occasion much difficulty in ascertaining what the real intention of the parties to the contract was, and in determining the legal effect of the clauses.

Clean charter.

A clean charter is one supposed to be free from all commission or agency fees, and to make the freight payable without deduction for discount.

Ship let for warfare, fishing, or other trades.

Besides these contracts a ship may be let for other purposes, such as being employed in warfare (2) or in the fishing, coasting, or other trades, under the entire management of the hirer; or by way of mortgage, reserving a temporary right of management to the owner; or one part-owner may let his share to another (3).

All charter-parties are not contracts of carriage.

All charter-parties are not contracts of carriage. Sometimes the ship itself, and the control over her working and navigation, are transferred for the time being to the persons who use her. In such cases the contract is really one of letting the ship, and, subject to the express terms of the charter-party, the liabilities of the shipowner and the charterer to one another are to be determined by the law which relates to the hiring of chattels (4), and not by reference to the liabilities of carriers and shippers. Also a charter-party may be made for other purposes than the carriage of goods; for example, for passenger service or for towage and salvage.

When the agreement is to carry goods which form only part of the intended cargo of the ship, the contract of affreightment as to each parcel of goods shipped may also be expressed in a charter-party, but is more usually evidenced in a document called a *bill of lading*, which serves also as a receipt by the shipowner, acknowledging

(1) *Evans* v. *Nichol*, 11 L.J. C.P. 6.

(2) *The Gauntlet*, L.R. 4 P.C. 184; *The International*, L.R. 3 A. and E. 321; *The Richmond*, 2 C. Rob. 325, 331.

(3) *Preston* v. *Tamplin*, 27 L.J. Ex. 192.

(4) As to which see *Robertson* v. *Amazon Tug and Lighterage Company*, 7 Q.B.D. 598; *Hyman* v. *Nye*, 6 Q.B.D. 685; *M'Carthy* v. *Young*, 30 L.J. Ex. 227; *The Undaunted*, 11 P.D. 46; *Sanderson* v. *Collins* (1904), 1 K.B. 628; *Coupé Company* v. *Maddick* (1891), 2 Q.B. 413.

that the goods have been delivered to him for a certain purpose. A bill of lading is rarely signed until some steps have been taken in pursuance of the contract it evidences. The charterer with whom the shipowner enters into the contract of affreightment may intend to supply the cargo himself. In this case, when the cargo is shipped, a bill of lading will almost always be signed, which is usually, while in the hands of the charterer, merely a receipt for the goods, but which may be evidence of a contract adding to or varying the contract between them contained in the charter-party. Or the charterer may intend to enter into sub-contracts of carriage with other shippers, who provide all or part of the cargo. In this case, as each shipper ships his goods, a bill of lading will be signed, evidencing a contract between the shipper on the one hand, and, according to circumstances, the shipowner or charterer on the other. Such contract will be independent of the contract contained in the charter-party, excepting so far as it expressly incorporates it.

A charter-party may also be made for other purposes than the carriage of goods; for example, for passenger service or for towage or salvage.

Three classes of contracts for hire of ship.

Contracts between merchants and shipowners for the hire of ships have been divided into three classes, namely (1): (I.) *Locatio navis*, a demise of the ship itself, with its furniture and apparel, but not manned (2); (II.) *Locatio navis et operarum magistri et nauticorum*, a demise of the ship in a state fit for mercantile adventure, including a master and crew; and (III.) *Locatio operis vehendarum mercium*, a contract for the carriage of the merchant's goods in the owner's ship and by his servants.

Respecting the first of these classes of contracts and the liability thereunder, no difficulty is likely to arise, as the shipowner surrenders to the charterer the possession of the ship with the right to appoint master and crew, and fully control them when appointed, and the charterer alone can be made liable. In the third class of such contracts it is equally plain that the shipowner retains full control over his ship, and that the master and crew are his servants,

(1) *Schuster* v. *M'Kellar* (1857), 26 L.J. Q.B. 281, 288.

(2) As to right of charterer to limit his liability in case of collision, see judgment of the House of Lords in *Sir John Jackson* v. *The Blanche*, Feb. 28, 1908.

and he is therefore liable for anything done by them in the performance of the contract of carriage. But it is in the construction of the second class that difficulties have occurred. A ship may be demised with her master and crew so that the charterer has the sole control or ordering the whole; or she may be demised so that whilst the charterer has the right to order the lading and carrying of cargo and other matters, the general control of the ship, her master and crew, remain in the shipowner; or it may be that the contract, although purporting to demise the ship with her master and crew, appears by its other provisions to be intended only as a contract for the carriage of the charterer's goods as in Class III.

Legal consequences of ownership.

By the general law of shipping, as distinguished from the law of marine insurance, possession of the vessel as owner is accompanied with rights and liabilities of great importance. The common law right to detain goods for the payment of freight is dependent on this possession of the ship, as giving that possession of the goods without which there is no lien (1). Reciprocal with this lien is that responsibility, in virtue of which the freighter's action lies for non-delivery of the cargo. But liability for the supply of necessaries on the order of the master is a nicer question, capable of being complicated and varied by contract and by circumstances, and does not necessarily follow possession of the ship (2). The Courts are, therefore, careful that a circumstance attended with consequences of so much importance to the shipper, as well as the owner and the charterer, shall not be determined by the effect, strictly taken, of merely technical phraseology, the use of which in commercial instruments is too often the result of accident or sheer ignorance. It is now regarded as a question about the intention of the parties to the contract whether or not possession is thereby transferred to the charterer; and upon this the whole of the instrument, considered together and fairly interpreted, is the legitimate evidence submitted to the Court (3). That was not always

Technical phraseology not interpreted strictly.

(1) Per Gibbs, C.J., in *Hutton* v. *Bragg*, 7 Taunt. 14; *Small* v. *Moates*, 9 Bing. 579.

(2) *Brodie* v. *Howard*, 17 C.B. 109; *Mitcheson* v. *Oliver*, 5 E. and B. 419.

(3) *Christie* v. *Lewis*, 2 B. and B. 410; *Dean* v. *Hogg*, 10 Bing. 345; *Yates* v. *Railston*, 8 Taunt. 293; *Tate* v. *Meek*, 8 Taunt. 280; *Belcher* v. *Capper*, 4 M. and G. 502.

the rule, however. There has been vacillation in the Courts, and in consequence a conflict of decisions that renders it the more necessary to observe what rule on this question is from time to time in the ascendant. Tindal, C.J., in *Belcher* v. *Capper* (1): "It must be admitted that there is some contradiction in the authorities bearing upon the first point, viz. the right of lien in the owners of the ship, and that, in the later cases, the terms of actual demise have not been considered as affording so decisive a criterion of the intention of the contracting parties as was supposed to belong to them in the case of *Hutton* v. *Bragg* (2). But when the several cases are closely examined, it will be found that the apparent conflict of authorities in this instance, as in all other questions arising from the construction of written instruments, arises more from the variety of terms employed by the parties themselves in framing their contracts than from difference of opinion in the judges who interpret them; for in each of the cases in which the owner's lien has been supported notwithstanding the terms of express demise, other stipulations will be found sufficient to rebut the inference that the owners meant to part with the possession of the ship. Thus in *Mitchell* v. *Scaife* (3), *Birley* v. *Gladstone* (4), *Yates* v. *Railston* (5), and *Christie* v. *Lewis* (6), there were terms that showed that the payment of the hire was to be either precedent to, or concomitant with, the delivery of the goods; whereas in *Small* v. *Moates* (7) the lien of the owner was expressly reserved by the charter-party. In each case the whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other; and thus it often happens that the same expression will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found" (8). It seems, however, to be generally the rule that the party that mans the

(1) 4 M. and G., p. 540.
(2) 7 Taunt. 14.
(3) 4 Camp. 298.
(4) 3 M. and S. 205.
(5) 8 Taunt. 293.
(6) 2 B. and B. 410.
(7) 9 Bing. 574.
(8) See also observations of Tindal, C.J., in *Dean* v. *Hogg*, 10 Bing., p. 350. See also *Palmer* v. *Gracie*, 4 Wash. C.C. 110; *Hooe* v. *Groverman*, 1 Cranch. 214; *Clarkson* v. *Edes*, 2 Cow. 470.

vessel is to be considered as in possession (1). But this may be rebutted by clear evidence to the contrary.

As a rule, charter-parties are made for the purpose of securing to the charterer the *use* merely of the ship on a particular voyage or series of voyages. The whole control and management of the ship is therefore left undisturbed in the hands of the owner, who remains in possession by his servants the master and crew. In such a case the shipowner acts as a carrier of the goods upon the agreed terms.

Where charterer has only use of ship.

Contracts in which the possession of the ship is handed over to the charterer are not so frequent. But they are at times made, and sometimes in such doubtful forms that it is difficult to tell whether, in fact, the possession does or not pass to him.

Where a ship is completely transferred to a hirer for a period of time, and the shipowner during that time has nothing whatever to do with the appointment of her officers or crew, or with the working or management of her, the case is clearly one of letting and hiring.

Locatio navis. Class I.

In *Reeve* v. *Davis* (2) a steam vessel was let by charter-party for twelve months, the registered owners engaging to keep the engine in repair, but the charterer binding himself to do all other repairs, to pay all wages and charges of navigating, etc., and to indemnify the owners against all debts, costs, damages, etc., incurred in respect of the charter-party and employment of the vessel. The owners were to appoint the engineers. The charterer, who acted as captain, had repairs done to the vessel by persons unacquainted with the above contract. It was held that no action lay, in respect of those repairs, against the registered owners (3).

In *Burnard* v. *Aaron* (4) A. and S. were joint-owners of a ship. A. worked the ship, defraying all the expenses and taking the entire management of her, and he took two-thirds of the gross earnings; S. did nothing, and took

(1) *Marcardier* v. *Chesapeake Insurance Company*, 8 Cranch 39; *The Schooner Volunteer*, 1 Summer 551; *M'Intyre* v. *Boone*, 1 Johns. 229.

(2) (1834), 1 A. and E. 312.

(3) See also *Fraser* v. *Marsh* (1810), 2 Camp. 516; *Meiklereid* v. *West* (1876), 1 Q.B.D. 428.

(4) (1862), 31 L.J. C.P. 334.

the remaining one-third of the gross earnings. It was held that the result of these facts was that A. hired the share of S. in the ship, and that he was not the partner or agent of S., so as to render S. liable in an action for damages caused by the negligence of A. It was doubted by Mr Justice Byles whether the same rule would hold in an action on contract.

A., the registered owner of a vessel, agreed with B., the master, that B. should take the vessel wherever he chose, and engage the men, on condition that A. should receive a third of the net profits, B. rendering to A. an account of the profits. A. subsequently was registered as the managing owner. The men were hired and paid and the stores supplied by B. It was held that A. was responsible for injury caused by the vessel through B.'s negligence (1).

Distinction between *Burnard* v. *Aaron* and *Steel* v. *Lester*

The distinction between the two cases of *Burnard* v. *Aaron* and *Steel* v. *Lester* appears to be that, in the one, the master paid over a share of gross profits and undertook all liabilities in any event, and was in the position of an independent contractor; whereas, in the other, the master paid over only a share of net profits after paying expenses, apparently undertaking no liability except so far as covered by profits, and remained only a servant or agent.

Sometimes the owner provides the ship and crew, but allows the charterer to appoint his own master. The question whether the captain is the servant of the shipowner or of the charterer, or whether he is, to a certain extent, the servant of both, depends on the particular charter. In construing a charter-party, with the view of ascertaining whether the owner has relinquished possession of the ship to the charterer, or whether he has retained a right of lien upon the cargo, for the payment of the freight agreed on, the Court will not rely implicitly upon particular expressions of demise or otherwise, but will collect the intention of the parties from the whole scope of the instrument (2). When it is required to find out whether the owner is the employer of the master and crew or any of them, the primary questions seem to be, Who pays them? Who appointed them? Who can dismiss them?

(1) *Steel* v. *Lester*, 1877, 3 C.P.D. 121.
(2) *Belcher* v. *Capper*, 11 L.J. C.P. 274.

The last being, perhaps, the most important of the three. The Court of Appeal held in *The Beeswing* (1) that a master appointed by charterers, but whom the owners had contracted to pay, and who was subject to the owners' orders as to navigation, and to be dismissed by them, was their servant. This appears to be also the law of America (2). It would seem that where the original appointment is in one person, and the power of dismissal in another, the control rests with the latter.

Person appointing master liable. Class II.

If one party appoints the captain and the other pays him, he is generally considered as holding the possession of the vessel for the party appointing him. Thus, in the American case of *M'Gilvery* v. *Capen* (3), it was held that a master employed by the owners of a vessel, though paid by the charterer, had no claim upon the charterer for his services after the wreck of the vessel, on the ground that the charterers were not the owners *pro hac vice*, and that their agreement to pay ceased on the wreck of the vessel. So in *Lander* v. *Clark* (4), the owners were to keep the vessel tight and pay the charge of victualling and manning her; the charterer was to appoint the master, and put such goods on board as he thought proper, and was to pay port charges, pilotage, etc., and to deliver up the vessel on his return. It was held that the owners had parted with their possession. In *Fenton* v. *Dublin Steam Packet Company* (5) an action was brought against the owners of a steam packet for injuries done to the plaintiff's vessel by negligence of the crew of the steam packet. The vessel was under a charter-party at the time of the alleged wrong, the charterer paying the captain and crew, and all disbursements, harbour dues, pilotage, etc. The owners appointed the captain, crew, and engineers. The captain obeyed the orders of the charterer as to where the vessel was to go, but not as to the mode of navigation. The Court held that the crew were the servants of the owners, and that the owners were therefore liable.

Where a ship is chartered under a charter providing that the master shall be appointed by the charterers; that the owners are to provide and pay for all provisions and wages

(1) 5 Asp. M.C. 484, 487. (2) 1 Parson's Shipping, 278.
(3) 7 Gray 523. (4) 1 Hall 355. (5) 8 A. and E. 835.

of captain and crew, and for the necessary equipment and efficient working of the ship; that the captain is to be dismissed by the owners if he fails to give satisfaction; and that the charterers shall provide and pay for all coals, pilotages, port charges, etc., the master is the servant of the shipowners, and hence he has a right *in rem* for his wages and such disbursements as are necessary for the navigation of the ship, and which the charterers had not, by the provisions of the charter, undertaken to pay; and Brett, M.R., thought that if the charterers had refused to make these disbursements, and without them the ship could not be navigated, the master would be entitled to charge them against the shipowners (1).

By charter-party it was agreed that the owners of the ship should provide and pay for provisions and wages, and that the charterer should provide and pay for coals and other expenses. The master was to be appointed by and was to follow the instructions of the charterer. The master, with notice of the charter-party, ordered and made himself liable for provisions and coals for the vessel at a foreign port. These provisions and coals were necessary to enable the vessel to perform her voyage. It was held, in an action by the master against the vessel, that he was entitled to recover for the provisions but not for the coals, as by the terms of the charter-party he had no power to pledge the vessel's credit in respect of them (2).

In *The Tasmania* (3) a steam-tug under charter came into collision with a smack which she was towing, through the sole negligence of a servant of the charterers, who was in charge of the tug. The towage was on the terms that the charterers were not to be answerable for damage occasioned by the negligence of their servants. In an action *in rem* against the tug, brought by the owner of the smack to recover damages for the collision, it was held that the maritime lien resulting from a collision is not absolute, and that the negligence causing the collision being solely that of the servant of the charterers, whatever was a good defence to an action against them was a good defence to an action *in rem* against the tug.

(1) *The Beeswing*, 5 Asp. M.C. 448.
(2) *The Turgot*, 11 P.D. 21. (3) 57 L.J. Ad. 49.

Part-owner liable for repairs ordered by other part-owner.

A party who has sold one moiety of his interest in a ship and let the other moiety to the purchaser, who is to act as ship's husband and managing owner, is liable for repairs ordered by such purchaser and lessee, even after the vessel has been chartered for a voyage, unless there is anything in the contract to exclude such a liability. In such a state of things, the charterer not being bound to repair the vessel, although possibly the owner would not be bound to do so, yet if the purchaser and lessee, as being managing owner and ship's husband, deems it advisable and advantageous that the owner should do repairs previous to the vessel sailing, it is competent for him to bind the part-owner by an order for their execution. Nor is there anything to exclude such authority and liability in the circumstance that the purchaser of one moiety is, by the contract of sale, to pay a gross sum to the seller as a consideration for the use of the other moiety for a certain period, and is to have during that period the entire use and control of the vessel and all her earnings (1).

In *Weir* v. *Union S.S. Company* (2) a ship was let by charter-party to the charterers for their sole use and benefit for the conveyance of merchandise and/or passengers, with liberty to sub-let (subject to owner's approval of trade), for two or three round voyages, at charterers' option, to be placed by a certain day "with clear holds" at the disposal of the charterers, they "having the whole reach or burden of the vessel," proper and sufficient room being reserved to the owners for the officers, crew, tackle, etc.; the owners undertaking to maintain her in a thoroughly efficient state during the currency of the charter, the captain to use every reasonable despatch in prosecuting the voyages, and (though appointed by the owners) to be under the orders and directions of the charterers as regards employment, agency, and other arrangements; the freight for the hire of the ship to be paid monthly until she was returned by the charterers to the owners. The House of Lords held that, upon the true construction of the whole of the charter-party (without deciding whether the contract more nearly

(1) *Preston* v. *Tamplin*, 26 L.J. Ex. 316.

(2) 1900, A.C. 525. See also *Trinity House* v. *Clark*, 4 M. and S. 288, and the remarks in *Weir* v. *Union S.S. Company* of Lord Davey upon that case.

resembled one of demise than of carriage), the responsibility for the navigation of the ship was imposed upon the owners, and that the owners were therefore liable to provide any ballast that might be necessary for safe navigation (1).

Class II. *Locatio navis et operarum magistri, i.e.* the demise of a ship in a state fit for mercantile adventure, including a master and crew.

Where the charterer appoints master and crew, the presumption is that they are his servants, but in this class of contract the shipowner usually appoints and pays the master and crew, whilst the charterer controls the voyages the ship is to make and the cargoes she is to carry; or it may be said that the charterer directs the service to be performed by the ship and the owner directs the way in which the service is to be performed. This condition of things has given rise to many decisions as to the responsibility of charterers and owners.

In *Trinity House* v. *Clark* (2) the owners by the charter-party had granted, and to hire and freight let their ship, to the Government commissioners, to be employed in the transport service for three months entire and longer should the commissioners require it, at so much per ton by the month, the vessel to be manned and provided by the owners in accordance with the terms of the instrument; and afterwards upon a claim against the owners for Trinity House dues, it was held that the vessel *pro hac vice* was a king's ship, and the dues not leviable, therefore, in respect of her for the time being. Lord Ellenborough, not overlooking on that occasion the nature of the service the ship was to be employed in, as bearing on the construction of the contract, availed himself, nevertheless, of all the force of the technical terms of demise which he found there to strengthen the conclusion at which he had arrived.

Construction determined by intention, not by technical terms.

But in the later case of *Christie* v. *Lewis* (3), where the owners and charterers, respectively for themselves, their executors, administrators, and assigns, granted and to freight let—and hired and to freight took—the ship in question for a voyage from London to St John's and Demerara, and thence to London again, the charterers paying £2600 in

(1) See also *The Castlegate* [1895], A.C. 38.

(2) 4 M. and S. 288, 295, 297. See also observations of Lord Davey on this case in *Weir* v. *Union S.S. Company* [1900], A.C. 1, p. 531.

(3) 2 B. and B. 410.

all, the majority of the Court, finding the provisions in the body of the instrument inconsistent with the absolute terms of the demise at the commencement, held, notwithstanding the latter, that the owners retained possession of the ship; and they took occasion very expressly to state, that the question in these cases was not one about the meaning of particular terms of act, but a question about the intention of the parties as evidenced by the whole of the instrument taken together.

Where possession passes to charterer.

Accordingly Gibb, C.J., who had decided *Hutton* v. *Bragg*(1) in three cases(2) subsequently thereto, and arising out of one charter-party, held that, notwithstanding terms of absolute demise, as the delivery of the goods and payment of the freight were, by a subsequent provision in the same instrument, made concomitant acts, the owner had a right to detain the charterer's goods for the freight, not having parted with possession of the ship.

In *Colvin* v. *Newberry* (3) the owner of a ship appointed G. B. to the command, and agreed that he should proceed to Calcutta and return to London, and that he might make intermediate voyages, paying a certain sum in consideration thereof; and the owner further agreed to supply the ship with stores, in consideration of which G. B. agreed to take the command, and receive the ship into his service, for twelve months certain, or for such time as would be necessary to complete the voyage, paying at a certain rate per ton per month for the ship. It was held by the House of Lords, affirming the Exchequer Chamber, that although G. B. was further bound by the agreement to remit the freight bills to London as security, and that such bills were to be vested in trustees who were to receive the freight, and hand over the surplus to him, and although the owner was to have an agent on board, who was to have the sole management of the stores, and to have power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander, G. B. was the owner of the

(1) 7 Taunt. 18, commented on by Tindal, C.J., in *Dean* v. *Hogg*, 10 Bing. 345; and dissented from by the majority of the Court in *Christie* v. *Lewis*, 2 B. and B. 410.

(2) *Tate* v. *Meek*, 8 Taunt. 280; *Yates* v. *Railston*, 8 *id.* 293; *Yates* v. *Mennell*, 8 *id.* 302. See also *Saville* v. *Campion*, 2 B. and Ald. 503; *Faith* v. *East India Company*, 4 B. and Ald. 630; *Paul* v. *Birch*, 2 Atk. 621.

(3) 1832, 1 Ch. and F. 283.

vessel during the continuance of the charter-party, and was as such alone liable to persons who, knowing its provisions, had shipped goods on board the vessel for the homeward voyage. The principle of this decision is that owners are not liable for an act done by a person who, in doing that act, is not their servant, and this will be found to be the principle underlying all similar decisions, however obscurely worded.

Ship put up by charterer as general ship.

Where, for a lump sum, a vessel is chartered in a fit state for mercantile adventure, *i.e.* where there is a *locatio navis et operarum magistri*, and the vessel is put up by the charterer as a general ship, although the contract on the bills of lading is with the charterer, the owner is liable to a shipper in respect of a conversion of his goods by the master, especially if it appears that the owner has given instructions to the master in reference to the goods (1). Lord Campbell, C.J., thus states the case so far as it applies to the point now under discussion: "The ship had been chartered by M'Kellar, the owner, to Van Nothen & Co., for the voyage from London to Calcutta, for a lump sum of £1800, evidently to be put up by the charterers as a general ship, with a stipulation as to the master signing bills of lading for the benefit of the charterers. The master and crew were employed and paid by the owner. And this certainly cannot be considered *locatio navis*—a demise of the ship itself, with its furniture and apparel. It amounts to *locatio navis et operarum magistri et nauticorum*—a demise of the ship in a fit state for mercantile adventure; which is to be distinguished from the *locatio operis vehendarum mercium*—a contract for the carriage of the merchant's goods in the owner's ship and by his servants, where the owner has all the responsibility of a carrier of the goods. Notwithstanding some early conflicting decisions, it seems now settled by a numerous class of cases, from *Newberry* v. *Colvin* to *Marquand* v. *Banner*, that where there is a hiring of the ship, according to the second form above specified, with the intention that the charterer shall employ the ship as a general ship for his own profit, when the master signs bills of lading, he does so as the agent of the charterer, not of

Liability of shipowner to shipper.

(1) *Schuster* v. *M'Kellar*, 26 L.J. Q.B. 281, 288.

the owner. But still, the owner being in possession of the ship by his master and crew, he has rights in respect of this possession—as to claim a lien on goods on board for freight due to him—and he is liable for the acts and negligence of the master, as master irrespective of the contracts entered into by the master with the shipper of goods as agent for the charterer. Thus the owner, although the ship be so chartered, is clearly liable for a collision arising from the improper management of the ship, and for what the master does within the scope of his general authority as master which cannot be ascribed to his agency for the charterer" (1).

In *The Omoa Coal and Iron Company* v. *Huntley* (2) a charter-party provided that a vessel of the defendant's, maintained by the owners, with a full complement of officers and crew, should be placed under the direction of the charterer, merchant, or his assigns, to be employed by him for the conveyance of lawful merchandise and for passengers, as may be ordered by the charterers, the cargoes to be laden and discharged in any dock or other safe place as the charterers may order. The said steamer is let for the sole use of the charterers, and for their benefit, for the space of six months, with the option of twelve calendar months at charterers' option, commencing from the vessel's being ready at Grangemouth, to be at the disposal of the charterers. The charterers to have the whole reach of the vessel's holds, etc.; the captain to use all and every despatch in prosecuting the voyage, and the crew to render all customary assistance in loading and discharging; the captain to sign bills of lading as presented, without prejudice to this charter-party, to follow the instructions of the charterers or their assigns or consignees as regards loading, discharging, and departure. The coals for the steam engines shall be supplied at the cost of the charterers, as also all port and dock charges, pilotage, etc., the owners finding all stores, paying crew's wages, and necessary stores for engine-room, etc. That the freight for the hire of the steamer should be paid monthly in advance, that all derelicts and salvages should be for owners' and charterers' joint benefit, and that the

(1) See *Steel* v. *Lester*, 3 C.P.D. 121. (2) 2 C.P.D. 464.

captain should furnish the charterers when required with a true daily copy of the log. The ship, whilst on a voyage with a cargo shipped by the charterers, was wrecked through the negligence of the master and crew. It was held that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them (1).

Where the owner of a ship, registered as managing owner under the Merchant Shipping Act, chartered her under a charter-party, according to which the charterers were to provide and pay for all provisions, the wages of the captain, officers, and crew, and to meet all other charges whatsoever, except the insurance of the vessel and the cost of maintaining her in an efficient condition, shippers under bills of lading which were signed by the captain or the agents of the charterers, and did not refer to the charter-party, were held by the House of Lords to have no claim against the owner for the loss of the cargo in consequence of the unseaworthiness of the ship, inasmuch as the owner had divested himself of all control over the ship during the currency of the charter, and neither the captain nor the charterers' agent had authority to bind him by signing the bills of lading. It was further held that the register under the Merchant Shipping Act is only *prima facie* evidence of ownership, and its statutory effect may be displaced by proof of what the facts really are (2).

In *Sack* v. *Ford* (3) the plaintiff was charterer of a ship under a charter-party, by which the ship was placed at the disposal of the plaintiff for a certain time; the owners to appoint, victual, and pay the master and officers of the ship; the cargo "to be taken on board and discharged by the charterers, the crew of the vessel rendering customary assistance so far as they may be under the orders of the master, and the charterers are to have liberty to appoint stevedores and labourers to assist in the loading, stowage, and discharge thereof; but such stevedores and labourers

(1) See *The Beeswing* (1885), 5 Asp. M.C. 484, and *Belcher* v. *Capper* (1842), 11 L.J. C.P. 274.

(2) *The Baumwoll Manufactur Von Carl Scheibler* v. *Furness*, 62 L.J. Q.B. 201.

(3) 1862, 32 L.J. C.P. 12.

being under the control and direction of the master, the charterers are not in any case to be responsible to the owners for damages or improper stowage." And by another clause, "the master and the owners of the ship shall devote the same attention to the cargo, shall use the same endeavours to promote despatch, and shall in every respect be and remain responsible to all whom it may concern, as if the said ship was loading and discharging her cargoes and performing her voyages for account of the said owners and independently of this charter-party." It was held that under this charter-party the owners were responsible for improper stowage (1).

Liability of owners to third parties ignorant of the charter-party.

Charter-parties may not always be available for the protection of the owners of the ship, if other persons are allowed to obtain rights in ignorance of the existence of the charter-party; if, for instance, third parties are permitted to ship goods on board in ignorance that the vessel is chartered, their rights will be governed by any express stipulations made with them, and by the principles of the law of agency in accordance with the apparent state of the facts and the presumptions of fact reasonably arising thereupon. This effect of the law and the construction put upon such a state of facts appeared in the case of *Sandemann* v. *Scurr* (2). In that case a ship was chartered for a voyage from Oporto to the United Kingdom, to load a full cargo for the charterer at a stipulated rate of freight, the captain to sign bills of lading, if required, at any rate of freight, without prejudice to the charter-party. The ship was accordingly consigned to the charterer's agents at Oporto, and was put up by them as a general ship, without any intimation that she was under charter; the plaintiff shipped some casks of wine, and received bills of lading in the common form, signed by the master. The wine was stowed by a stevedore appointed by the charterer's agents and paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage, it was held that as the charter did not

(1) See also *Fenton* v. *City of Dublin Steam Packet Company*, 8 A. and E. 835, and *Reeve* v. *Davis*, 1 A. and E. 312, where the owners reserved to themselves the right of appointing the engineers only, the charterer being himself the master.

(2) L.R. 2 Q.B. 86.

amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine, inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, and had dealt with the master, who was still the owners' master, as clothed with the ordinary authority of a master to receive goods and give bills of lading by which the owners would be bound. It was held also that the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, and had a right to look to the owners for the safe stowage of the goods, as part of the carrier's duty, in the absence of any special agreement. It was questioned whether the charterer also would not have been liable to the shipper on the bills of lading signed by the master in furtherance of the charter-party.

Cockburn, C.J., in delivering the judgment of the Court in the above case, said (1): "The result of the authorities from *Parish* v. *Crawford* (2) downwards, and more especially the case of *Newberry* v. *Colvin* (3)—in which the judgment of the Court of Exchequer Chamber (4), reversing the judgment of the Court of Queen's Bench (5), was affirmed on appeal by the House of Lords—is to establish this position, that, in construing a charter-party with reference to the liability of the owners of the chartered ship, it is necessary to look to the charter-party to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew. In the first case, the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the

(1) L.R. 2 Q.B., p. 96. (2) 2 Str. 1251. (3) 1 Cl. and F. 283.
(4) 7 Bing. 190. (5) 8 B. and C. 166.

vessel, the ownership remains in the original owners, and through the master and crew, who continue to be their servants, the possession of the ship also. If the master, by the agreement of his owners and the charterer, acquires authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owners; in other words, he retains that relation to his owners out of which by the law merchant arises, the authority to sign bills of lading by which the owner will be bound. It appears to us clear that the charter-party in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either express or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continues, through the master and crew, in the possession of the owners, the master and crew remaining their servants. It is on this ground that our judgment is founded. We think that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement, whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well-known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But in our judgment this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading

attaches by virtue of his office. We think that, until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made" (1).

In that case the voyage seems to have been performed before the shipper was made aware of the existence of the charter-party. Where a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charter-party. A person who, without notice of any charter-pary, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charter-party containing objectionable provisions (2).

Where owners are to insure.

In an American case—*The Barnstaple* (3)—it was held by the Supreme Court that if a stipulation in the charter-party that "the owners shall pay for the insurance on the vessel" imposes any other duty upon the owner than that of paying the premiums, it goes no further than to render them liable for losses covered by an ordinary policy of insurance against perils of the sea; and as such policy would not cover damage done to another vessel by a collision with the vessel insured, the primary liability for such damage rests upon the charterers, who undertook to navigate the vessel with their own officers and crew, and not upon the owners. The Court said: "Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt (4), the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in

(1) See also *Newberry* v. *Colvin*, 7 Bing., pp. 206–7; *The St Cloud*, B and L. 15; *Schuster* v. *M'Kellar*, 26 L.J. Q.B. 281, 288; *The Figlia Maggiore*, L.R. 2 Ad. 106; *Gilkison* v. *Middleton*, 26 L.J. C.P. 209; *Tharsis Sulphur Company* v. *Calliford*, 22 W.R. 46; *Wagstaff* v. *Anderson*, 4 C.P.D. 282; 5 *id.* 171; *The Stornoway*, 51 L.J. P. 27; *The Emilien Marie*, 2 Asp. M.C. 514.

(2) *Peek* v. *Larsen*, 12 Eq. 378. (3) 181 U.S. 464.

(4) See *The Ticonderoga*, Swabey 215; *The Lemington*, 2 Asp. M.C. 475; *The Ruby Queen*, Lush 266; *The Tasmania*, 13 P.D. 110; *The Parlement Belge*, 5 P.D. 197; *The Castlegate* (1893), A.C. 38, 52; *The Utopia* (1893), A.C. 492; *The Druid* (1842), 1 W. Rob. 391; *The Ripon City* [1897], P. 224.

possession of her, whether as owner or charterer. . . . Indeed, the liability of the vessel for the negligence of the charterers is now fixed by statute in this country (1). . . . As the charterers hired the *Barnstaple* for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes —the owners only assuming to deliver the vessel to the charterers in good order and condition and to maintain her in an efficient state during the existence of the charter-party—there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault" (2).

Class III. *Locatio operis vehendarum mercium.*

The third class of contract, *locatio operis vehandarum mercium*, is the ordinary contract for the carriage of merchants' goods in the owner's ship, and by the latter's servants. Whether such a contract is by charter-party or by bill of lading, the shipowner remains liable for all contracts or acts made or done by his master and crew.

(1) Rev. Stat. sec. 4286.

(2) *Thorp* v. *Hammond*, 12 Wall. 408; *Williams* v. *Hays*, 143 N.Y. 442; *Scott* v. *Scott*, 2 Starkie 438; *Webster* v. *Disharoon*, 64 Fed. Rep. 143. See DEFINITIONS, "Capable of being covered by Insurance."

CHAPTER III

PARTIES TO THE CONTRACT

Classes of agents.

AGENTS who may have authority on behalf of the shipowner to effect charters, sign bills of lading, or to transact other business generally, are: (i) the managing owner, (ii) the captain, and (iii) brokers.

Managing owner.

Ship's husband.

The managing owner is an agent appointed by the other owners to do all things necessary to enable the ship to prosecute her voyage and earn freight (1). He used to be called "ship's husband." He may be a part-owner or a stranger. His powers are by mandate or written commission by the owners, or by verbal appointment; the latter chiefly where he is also part-owner. Owing to the changes which have of recent years taken place, it is not unusual to find many vessels owned by limited companies (single ship companies), and in such cases the articles of association generally contain suitable provisions relating to the appointment and duties of the managing owner, and shareholders in these companies will be bound by the articles. By the Merchant Shipping Act 1894, sec. 59, the name and address of the managing owner of every British ship, or of the ship's husband, or person to whom the management of the ship is entrusted by the owner, must be registered at the Custom House of the ship's port of registry. The fact that any person is registered as "managing owner" is not conclusive that he has authority to bind his co-owners, but may be displaced by evidence of absence of authority (2).

Duties of managing owner.

His duties are to arrange for everything for the outfit and repair of the ship, stores, furnishings; to enter into con-

(1) *Barker* v. *Highley*, 15 C.B. N.S. 27, 34; *Thomas* v. *Lewis*, 4 Ex. D. 18, 23.
(2) *Fraser* v. *Cuthbertson*, 6 Q.B.D. 93; *The England*, 12 P.D. 32; *National Bank of Scotland* v. *Demhurst*, 1 Com. Cas. 318.

tracts of affreightment and charter-parties (1). And it has been held that this is such a duty as comes within the terms of his employment as managing owner, in respect of which he is not entitled to debit the ship with a commission (2). As managing owner he would, as between himself and the lender, have a right to borrow money if it was borrowed for the necessary purposes of the ship (3). He may also grant bills for furnishings, stores, repairs, and the necessary engagements which will bind the owners, although he may have received money wherewith to pay them (4). He may receive the freight, but is not entitled to take bills instead of it, giving up the lien by which it is secured. As the expenses of the voyage have usually been incurred by the managing owner or ship's husband, it may generally be said that he is the person to whom the freight ought to be paid. He has not, however, any charge upon it, but only a right to retain his advances on the ship's account out of it, when it comes to his hands; so that he cannot make a valid assignment of the freight, although the ship be indebted to him at the time (5). He has no power to insure without the owner's special authority (6). Circumstances may arise under which, in the course of business, he may borrow money, and delegate his authority to another; if so, his co-owners will be bound by his acts (7). A ship's husband, as such, has no authority to bind the shipowner to pay money to the charterer in consideration of the cancellation of the charter-party (8).

Director of company acting as ship's husband.

A ship's husband being the servant of the shipowners, it is *prima facie* a breach of trust in any director of a company, established for the purpose of acquiring and working of vessels, especially where the directors have the exclusive management of the concern, to take upon himself the duties of ship's husband. Where, therefore, in a company so constituted, one of the directors, with the consent of others forming with himself a board of directors,

(1) *Darby* v. *Baines*, 21 L.J. Ch. 801.
(2) *Williamson* v. *Hine* (1891), 1 Ch. 390.
(3) *The Faust*, 6 Asp. M.C. 126.
(4) *Rick* v. *Coe*, Camp. 639; *Whitwell* v. *Perrin*, 4 C.B. N.S. 412.
(5) *Beynon* v. *Godden*, L.R. Ex. D. 263; *Guion* v. *Trask*, 29 L.J. Ch. 337.
(6) Abbott on Shipping, 100; Story on Agency, s. 35.
(7) Story on Agency, ss. 104-105. (8) *Thomas* v. *Lewis*, 4 Ex. D. 18.

undertook the office of ship's husband, and in that character received out of the funds of the company such sums for commission and brokerage as are usually allowed to the ship's husband, it was held that he must refund those monies; and it would seem that the other members of the board of directors were similarly responsible in the event of any inability in the principal party to refund (1).

Shipbroker also managing owner.

A shipbroker who is also managing owner of a ship and receiving a fixed sum as remuneration for his services as such, is not entitled to make an extra profit for himself by commission or brokerage for procuring charters and freights, it being one of the duties of a managing owner to procure charters and freights (2).

Captain.

Where a ship is in a foreign port, and it is difficult to communicate with the owners, the master generally carries the owners' authority to enter into engagements on their behalf for carrying the goods in the ship, or for letting her services, provided those engagements are consistent with the usual manner of employing her adopted by the owners (3). Where the ship has been chartered by the owners, the master cannot cancel the charter-party or alter its terms (4).

It would seem that the master of a chartered vessel can settle a claim, arising at a foreign port, for demurrage, by detention beyond the period for which the rate of demurrage is stipulated, such a claim being in the nature of an unliquidated demand, which it is for the owner's benefit to have promptly settled abroad, without leaving it for disputed litigation at home (5). The master's contracts cannot bind the owner unless authority to bind the owner has been actually given to him; or unless the owner has, by word or deed, held out the master as his master, and thereby induced the vendor to supply the necessaries upon the credit of the owner (6).

(1) *Benson* v. *Heathorn*, 1 Y. and C., Ch. Cas. 326.

(2) *Williamson* v. *Hine* (1891), 1 Ch. 390.

(3) *Horsley* v. *Rush*, 7 T.R. 209. See also *Walske* v. *Provan*, 8 Ex., at p. 850; *Thomas* v. *Lewis*, 4 Ex. D. 18.

(4) *Pearson* v. *Goschen*, 33 L.J. C.P. 265; *Reynolds* v. *Jex*, 34 L.J. Q.B. 251; *Hall* v. *Brown*, 2 Dow. 367, 375; *Wiggins* v. *Johnston*, 14 M. and W. 609; *The Fanny*; *The Mathilda*, 5 Asp. M.C. 75.

(5) *Alexander* v. *Dowie*, 25 L.J. Ex. 281.

(6) *The Great Eastern*, L.R. 2 A. and E. 88.

The charter-party, when the ship is let at the place of the owners' residence, is generally executed by them, or some of them (frequently by the master also), and by the merchant or his agent. In a foreign port it must of necessity be executed on the part of the owners by the master only, unless they have an agent resident in such port duly authorised for this purpose. Lush, J., in *Adamson* v. *Newcastle S.S. Freight Insurance Association* (1), says: "The word charter imports a writing: a verbal charter is a thing unknown in maritime commerce." But Wigram, V.C., in *Lidgett* v. *Williams* (2), said that agreements of this kind may be made verbally. Sometimes such agreements are made by deed; but as the rule of law is that a deed executed by an agent does not bind his principal, unless authority to execute it has been conferred by deed (3), this course is usually to be avoided (4). And charter-parties under seal are now seldom seen (5).

Stamp required for charter-party.

A charter-party requires a sixpenny stamp (6). The Stamp Act 1891, s. 49, subs. 1, enacts that "the expression 'charter-party' includes any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing (7) between the captain, master, or

(1) 4 Q.B.D. 467. (2) 4 Hare 456.

(3) Chitty on Contracts (9th edit.), p. 192; *Horsley* v. *Rusk*, cited 7 T.R. 209.

(4) See *Hunter* v. *Parker*, 7 M. and W. 322. If C.D. by a proper deed authorise A.B. to execute a bond or other deed for him, A.B. may do this either by writing "C.D. by A.B. his attorney," or by writing "A.B. for C.D.," provided he delivers the instrument as the deed of C.D.; *Wilks* v. *Back*, 2 East. 142. Parol ratification by the principal of a deed executed by an agent without authority does not make the deed valid; see *Hunter* v. *Parker*. As to what evidence will warrant a presumption of authority in the agent, see *Lord Gosford* v. *Robb*, 8 Ir. L.R. 217.

(5) As to the owners' liability when goods have been shipped under a charter-party under seal not binding on them, see *Leslie* v. *Wilson*, 3 B. and B. 171. As to varying a charter-party under seal, see *White* v. *Parkin*, 12 East. 578; *Thomson* v. *Brown*, 7 Taunt. 656.

(6) Stamp Act 1891, 54 and 55 Vict. c. 39, Schedule I.

(7) It was held in *Rein* v. *Lane*, 15 L.T. 466, that by the words "or any memorandum, letter, or writing," was meant any such document in the nature of, or to the same effect as a charter-party, and therefore that a guarantee for the performance of a charter-party was not within the enactment. Blackburn, J., said: "The words, taken in their most literal and extended sense, would apply to every letter written by the captain of a ship relating to the freight, but that could not be the meaning of the Legislature. What was intended by the Legislature was, that any letter or agreement in the nature of a charter-party, so as to be equivalent to one, should be stamped with the duty on a charter-party, so that the stamp duty should not be evaded."

owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of the ship or vessel." Subs. 2: "The duty upon a charter-party may be denoted by an adhesive stamp (1), which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract."

Cancellation of stamp.

Cancellation of adhesive stamps is effected by writing the party's name or initials, or the name or initials of his firm, across the stamp, and the true date of his so doing, so that the stamp may be effectually cancelled and rendered incapable of being used again; and the person so required to cancel, who neglects or refuses effectually to do so, forfeits £10 (2).

Charter-parties executed abroad.

By section 50 of the Stamp Act 1891 it is provided that: "Where a charter-party is first executed out of the United Kingdom without being duly stamped, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument when so stamped shall be deemed duly stamped" (3).

Charter-parties stamped after execution.

Section 51 of the Stamp Act 1891 enacts that "a charter-party may be stamped with an impressed stamp after execution upon the following terms; that is to say—(*a*) Within seven days after the execution thereof, on payment of the duty, and a penalty of 4s. 6d.; (*b*) after seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of £10; and shall not in any other case be stamped with an impressed stamp" (4). It was held by Lord Hannen and

(1) Sir James Hannen said in *The Belfort*, 53 L.J. Ad. 90: "It seems to me that it was never intended that, in case of charter-parties executed abroad, the parties should have adhesive stamps with them."

(2) Stamp Act 1891, s. 8 (3).

(3) Lord Hannen and Sir Charles Butt both held in *The Belfort* (1884), 9 P.D. 215, that a similar section applied to an instrument executed first by a person abroad and then by a person in this country, and not to an instrument wholly executed abroad.

(4) The result of the concluding words of the section is that, except upon the terms, and within the time limited, the charter-party cannot, after execution, be stamped at all. See Stamp Act 1891, ss. 2, 7, and 8.

Sir Charles Butt in *The Belfort* (1) that a similar section in a previous Act did not govern an instrument wholly executed abroad, but such charter-party came within the section corresponding to section 15 (3) (*a*) of the Stamp Act 1891, which enacts that "any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom may be stamped at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only."

Secondary evidence of lost document.

It lies upon the party objecting to secondary evidence of the contents of a lost document to show that it was not stamped. If it be shown that at one time it was unstamped, that fact by itself will raise the presumption that it continued without a stamp. But where it appeared that a charter-party, at the time of its execution, was unstamped, and within the specified days allowed by the Act for stamping such instruments it was taken to the district stamp office at C., and the duty and postage paid, in order that it might be sent to London to be stamped, and the clerk to whom it was delivered proved that he sent to London all documents left with him for that purpose; the clerks in London said they were unable to say whether such a document was or was not returned, but, if it was, it would be returned in the usual course to the district office in the country; and the clerk there could not say whether it was returned or not, but, on search being made for it, no trace of it could be discovered, it was held that the evidence left it altogether uncertain whether the document was stamped or not; that the presumption of its being unstamped was done away with, and that the secondary evidence was admissible (2). A charter-party which has not been duly stamped cannot be given in evidence in a court of law, if it has been executed in any part of the United Kingdom, or if it relates "to any property situate or to any matter or thing done or to be done in any part of the United Kingdom" (3).

(1) (1884) 9 P.D. 215.

(2) *Closemadeuc* v. *Carrel* (1856), 25 L.J. C.P. 216. See also *Smith* v. *Maguire* (1858), 1 F. and F. 199; and *Braythwayte* v. *Hitchcock* (1842), 10 M. and W. 494; *Stowe* v. *Querner*, L.R. 5 Ex. 155.

(3) *Ib.* s. 14.

When charter-party under seal.

The execution of a charter-party, under seal, by the master, although said to be done on behalf of the owners, does not furnish a direct action, grounded upon the instrument itself, against them (1). The agent either of the owner or merchant may, however, and sometimes does, execute a charter-party, and covenant in his own name, for performance by his principal, so as to bind himself to answer for his principal's default, by force of the deed (2).

In an action to recover freight or demurrage, claimed in pursuance of a charter-party by deed, the statement of claim must be specially framed on the deed itself (3). If the owner, therefore, execute a deed to the merchant containing the usual covenant for a right delivery of the cargo, he cannot be sued by the merchant for not delivering it in an action grounded on the bill of lading signed by the master (4).

Who may sue.

Whether the instrument be under seal or not, an action at law grounded upon it must be brought either in the name of one who is a party to it, or in the name of one to whom such party may have assigned the chose in action (5). The purchaser, therefore, of a ship previously chartered, would still be unable to sue in his own name for the freight earned under the charter-party (6), unless it were assigned to him; and yet payment to him will be a good answer to an action brought in the name of the vendor, at least if the purchase was made before the ship sailed on the voyage (7).

Who can bring an action on covenants.

If a charter-party is expressed to be made between certain parties, as between A. and B., owners of a ship, whereof C. is the master of the one part and D. and E. of the other part, and purports to contain covenants with C., nevertheless C. cannot bring an action in his name upon

(1) *Harrison* v. *Jackson*, 7 T.R. 207, and *Horsley* v. *Price*, there cited; *Berkeley* v. *Hardy*, 5 B. and C. 355; *Hunter* v. *Parker*, 7 M. and W. 322, 343; *Wilks* v. *Backe*, 2 East. 142.

(2) *Gardner* v. *Lachlan*, 8 Sim. 115.

(3) *Atty* v. *Parish*, 1 B. and P. N.R. 104; *Schack* v. *Anthony*, 1 M. and S. 573.

(4) *Hunter* v. *Prinsep*, 10 East. 378.

(5) Judic. Act 1873, s. 25 (6); *Sanders* v. *Vanseller*, 4 Q.B. 260; *Kemp* v. *Clark*, 12 Q.B. 647; *Stindt* v. *Roberts*, 17 L.J. Q.B. 166; *Smidt* v. *Tiden*, L.R. 9 Q.B. 446.

(6) *Splidt* v. *Bowles*, 10 East. 279, where the charter-party appears to have been under seal; *Morrison* v. *Parsons*, 2 Taunt. 407, where it was not under seal.

(7) See also *Moores* v. *Hopper*, 2 B. and P. N.R. 411. See Chapter IX.

the covenants expressed to be made with him, nor give a release of them, even although he seals and delivers the instrument (1). But if the charter-party is not expressed to be made between parties, but runs thus: This charter-party indented witnesseth that C., master of the ship W., with consent of A. and B., the owners thereof, lets the ship to freight to E. and F., and the instrument contains covenants by E. and F., to and with A. and B.; in this case A. and B. may bring an action upon the covenants expressed to be made with them; although, unless they seal the deed, they cannot be sued upon it (2). This letter, therefore, is the most proper form.

When not under seal

More usually, when the object of the parties is the conveyance of goods merely, the agreement of charter-party is not under seal; and in that case, one who contracts in his own name, although he is agent of another, and notwithstanding he adds this, being merely a description of himself, whether in the body of the contract (3), or after his signature (4), may sue or be sued on the charter-party (5). It is always competent, however, to show that either party contracted as agent, for the purpose of making the undisclosed principal plaintiff (6) or defendant to the action (7), although he made the contract as his own agent and

Executed by agent.

(1) *Scudamore* v. *Vandenstein* (1587), 2 Co. Inst. 673. See also Lord Ellenborough's judgment in *Storer* v. *Gordon and Others* (1814), 3 M. and S. 322; *Salter* v. *Kidgly* (1689), Carthew, p. 76; and *Barclay* v. *Hardy* (1826), K.B., Easter term, 7 Geo. IV.

(2) *Cooker* v. *Child* (1722), 2 Lev. 74; and see *Gilby* v. *Copley* (1683), 2 Lev. 138. Abbott on Shipping, 5th edit., p. 166.

(3) *Parker* v. *Winlow*, 7 E. and B. 942. The phrase "as agent" in the body of an instrument executed by the same party in his own name simply, is held merely descriptive and consequently of no effect (*Price* v. *Walker*, L.R. 5 Ex. 173, commented on in *Gadd* v. *Houghton*, 1 Ex. D. 357; *Hough* v. *Manzanos*, 4 Ex. D. 104).

(4) *Lennard* v. *Robinson*, 5 E. and B. 125. Otherwise, where he contracted "as agent" in the body of the instrument, and at the end of it signs for his principal (*Deslandes* v. *Gregory*, 29 L.J. Q.B. 93). But yet in such a case local usage was allowed to make him liable (*Hutchinson* v. *Tatham*, 8 C.P. 482).

(5) *Cooke* v. *Wilson*, 1 C.B. N.S. 153; *Kennedy* v. *Gouveia*, 3 Dow. and R. 543; per Bayley, J., *Sargent* v. *Morris*, 3 B. and Ald. 277, 280; *Higgins* v. *Senior*, 8 M. and W. 834; *Short* v. *Spackman*, 2 B. and Ad. 962. See the discussion in *Fawkes* v. *Lambe*, 31 L.J. Q.B. 98.

(6) *Garrett* v. *Handley*, 4 B. and C. 654; *Bateman* v. *Phillips*, 15 East. 272; *per curiam*, *Higgins* v. *Senior*, 8 M. and W. 834, 844; *Fawkes* v. *Lambe*, 31 L.J. Q.B. 98; *Watson* v. *Swann*, 31 L.J. C.P. 210.

(7) *Paterson* v. *Gandasequi*, 15 East. 62; *Thomson* v. *Davenport*, 9 B. and C. 79; also 2 Smith. L.C.

stipulated therein for a cesser of liability after loading the cargo (1).

But such evidence cannot be given for the purpose of discharging either party from the liability which upon the face of the contract it appears he has incurred (2); since that would be to admit parol evidence for the purpose of contradicting a written document. By the same rule one cannot sue as principal on a contract in which he appears as agent for another whom he names therein (3); but where part performances had been accepted, under notice of the real relation of the parties, there it was held that an action would lie for non-acceptance of the residue and payment accordingly (4). For the same reason, the owner of the ship cannot sue one charter-party concluded in the name of another styling himself owner, though that other was really an agent, and had no interest in the vessel, since evidence of this is not admissible (5).

Agent should contract in name of his principal to escape liability.

If an agent is desirous of protecting himself from liability on the charter-party, he ought to contract in the name of his principal, and sign in the name, or *per procuration* of the same (6). "On account of" in the body, and at the end of the name of the agent, simply is held sufficient to protect from liability (7).

The cases on this subject were shortly summed up by Mellish, L.J., in the following terms (8): "As is said in the note to *Thomson* v. *Davenport* (9), when a man signs a contract in his own name he is, *prima facie*, a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him." It has accordingly been held that a mere description of the party signing as being the agent

(1) *Schmaltz* v. *Avery*, 16 Q.B. 655; *Carr* v. *Jackson*, 7 Ex. 382; *Adams* v. *Hall*, 37 L.T. 70.

(2) *Higgins* v. *Senior*, 8 M. and W. 834; *Jones* v. *Littledale*, 6 A. and E. 486; *Magee* v. *Atkinson*, 2 M. and W. 440.

(3) *Bickerton* v. *Burrell*, 5 M. and S. 383; *Fairlie* v. *Fenton*, L.R. 5 Ex. 169.

(4) *Raynor* v. *Grote*, 15 M. and W. 359.

(5) *Humble* v. *Hunter*, 12 Q.B. 310.

(6) Per Lord Campbell, C.J., *Parker* v. *Winlow*, 27 L.J. Q.B. 49, 52; per Cresswell, J., *Cooke* v. *Wilson*, 26 L.J. C.P. 15, 18; *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36.

(7) *Gadd* v. *Houghton*, 1 Ex. D. 357.

(8) *Gadd* v. *Houghton*, 1 Ex. D., p. 360.

(9) 2 Sm. L.C., citing from the 6th edit., p. 344.

of another person, whether it be made in the body of the instrument (1) or in the signature (2), is not enough to exonerate the person signing from responsibility; in each case the whole of the contract must be considered, and it must be clear that the intention is to exclude liability, for if the instrument is ambiguous, it will be construed against the person signing (3). On the other hand, if both parties, intending that the persons signing as agents shall not be personally responsible, the latter do not become bound merely because the form of the charter-party is such as to impose a *prima facie* liability on them (4). A statement by a defendant, at the time of signing, to a plaintiff who did not dissent that he (the defendant) did not intend to render his firm personally liable, was held sufficient to relieve the firm (5).

The whole contract must be considered.

In *Smith* v. *M'Guire* (6), Pollock, C.B., said that the question to be answered in such cases is, "Has the person who is to be charged with liability under this commercial instrument, or with the contract, whatever it may be, authorised and permitted the person who has professed to act as his agent, so to act in such a manner and to such an extent as that, from what has occurred publicly, persons dealing with him have a reasonable right to conclude and to draw the inference that the person so acting is a general agent? . . . If that was the reasonable conclusion, I think the defendant is bound, though it should turn out that he had determined the extent of the agency by all sorts of rules and calculations."

And when one professing to act as agent was not authorised at the time the charter-party was made, the principal may still be bound by it, if it was expressed to be made on his behalf, and he has afterwards ratified it by some act which shows an adoption of it (7). But an act adopting the contract by a person for whom the agent

Unauthorised act of agent. Ratification by principal.

(1) *Parker* v. *Winlow* (1857), 7 E. and B. 942.
(2) *Lennard* v. *Robinson* (1855), 5 E. and B. 125.
(3) See per Crompton, J., *Deslandes* v. *Gregory* (1860), 29 L.J. Q.B. 93. See also *Wake* v. *Harrop* (1862), 31 L.J. Ex. 451.
(4) *Wake* v. *Harrop*, 31 L.J. Ex. 450.
(5) *Cowie* v. *Witt* (1874), 23 W.R. 76.
(6) 27 L.J. Ex. 465, pp. 468–9.
(7) *Maclean* v. *Dunn*, 4 Bing. 722; *Forster* v. *Bates*, 12 M. and W. 226; *Bird* v. *Brown*, 19 L.J. Ex. 154.

did not profess to act will not make that person a party to the contract (1).

Mistakes.

Sometimes by mistake the written instrument contains less than the parties intended; sometimes it contains more. In such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will re-form the contract so as to make it conformable to the precise intent of the parties (2).

It is upon the same ground that equity interferes in cases of written agreements, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake (3).

Where a mistake or error arises in communicating the principal's instructions to the agent, and the latter innocently acts on such mistaken instructions, he will not be liable in an action founded on such mistake. Thus when a firm of shipbrokers signed a charter-party in the form, "by telegraphic authority" of the charterer "as agent." Owing to a mistake made by the officials in its transmission, the rate of freight offered by the charterer had been misrepresented in the telegram which the shipbrokers had received from him. It was held, in an action brought by the owners of the ship against the shipbrokers for breach of warranty of authority, that evidence of persons engaged in the business was admissible to explain the effect of the form of signature; that such evidence showed that it was commonly adopted in order to negative the implication of any further warranty by the agent than that he had received a telegram which, if correct, authorised such a charter as that which he was signing, and that the shipbrokers were therefore liable (4).

Agent who signs by "telegraphic authority."

Misdescription of parties in contract.

In *Humble* v. *Hunter* (5), in an action on a charter-party, which purported to be made by A.B., "owner of the ship *Ann*," etc., it was held that it was not competent to give parol evidence that A.B. acted not as owner, but as agent, for the real owner in making the charter-party. But where

(1) *Wilson* v. *Trumman*, 12 L.J. C.P. 306; *Saunderson* v. *Griffith*, 5 B. and C. 909; *Watson* v. *Swann*, 31 L.J. C.P. 210.

(2) Story, *Eq. Juris.*, s. 152. (3) Story, *Eq. Juris.*, s. 155.

(4) *Lilly* v. *Smales* (1892), 1 Q.B. 456. See also *Mitchell* v. *Kahl*, 2 F. and F. 709.

(5) 17 L.J. Q.B. 350.

a firm described themselves "as agents of the freighter," without naming any principal, a plaintiff who carried on business in the name of that firm was allowed to prove that he was really the principal one on the charter-party (1). In this latter case the Court distinguished *Humble* v. *Hunter*, on the ground that there the rejected evidence was a contradiction of an express statement of the contract, while in the latter case, if the defendant could in certain suggested circumstances be considered as filling the two characters of principal and agent, there was no contradiction of the charter-party. Another circumstance which weighed with the Court on both occasions was that in the first the freighter was entitled to rely on the credit of the agent, who described himself as owner; while in the second the freighter was admittedly unknown to the shipowner, and the latter did not think it was necessary to inquire who he was (2). Since the Judicature Acts it has been held, on demurrer, that a plaintiff not named in a charter-party might sue on it, on an allegation that the contract was between himself and the defendant, although by mistake and inadvertence of both parties the printed name of the company, whose form of charter had been used, had been allowed to appear in the instrument as a contracting party in the place of the name of the plaintiff; and it was also held that it was not necessary that the plaintiff should ask to have the charter-party re-formed (3).

Agent cannot alter charter-party.

An agent at a foreign port, to whom a ship is addressed for loading under a charter-party, has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo. "I think the extent of the agent's authority must be confined to this, that he has authority to do all things necessary to perform the charter-party, and, provided that the contract be substantially performed, to vary in slight matters. But he has no authority, such as is contended for here, to substitute a new contract, as it would be to substitute an essentially different port of loading, and to

(1) *Schmalts* v. *Avery* (1851), 20 L.J. Q.B. 228.

(2) See the arguments and judgment, where the various cases are referred to, 20 L.J. Q.B. 231.

(3) *Breslauer* v. *Barwick* (1876), 3 Asp. M.C. 355.

put on board another and a different article, and it would be highly mischievous to allow a charterer's agent to think that he has any such authority" (1).

In *Lindsay* v. *Scholefield* (2) a ship was chartered by Lindsay to carry oranges from Seville to Leith. She had liberty to load minerals and cork for owner's benefit before the full cargo of fruit was taken aboard. Delay having arisen in obtaining the mineral cargo, the master, with the consent of the shipper, loaded the fruit first, the result being that, before sailing, this fruit was stored for 6½ days instead of 1½ days. The oranges arrived damaged. The defence was that the shipper, as the charterer's agent, consented to the order of loading. It was held that the shipowner was liable in damages, assessed at the difference between the gross price realised for the damaged oranges and the prices realised in Leith for sound fruit shipped at the same time.

Agent expressly authorised to make alterations.

When the charter-party expressly authorised the charterer's agent at the loading port to make alterations in the charter, it was held that this included an authority to allow the ship to make an intermediate voyage before loading the homeward cargo (3).

Agents, when liable as principals.

An agent contracting and signing, as such, for an undisclosed principal, may be rendered personally liable on the contract, if a custom, among merchants in the course of ordinary trade constantly entering into similar contracts, can be shown to exist, that an agent so signing shall be personally liable in the event of his not disclosing his principal's name within a reasonable time, and evidence is admissible to prove the existence of such a custom (4). In the absence of such trade usage, a person who executes an instrument in the name of and expressly as an agent for another, cannot be treated as a party to the instrument so as to be sued upon it, unless he be shown to be the real principal. It would seem, however, that one who contracts as agent for another, without in fact having any authority to do so, may, if he acts *mala fide* be liable to the party

(1) Per Williams, J., *Sichens* v. *Irving* (1859), 29 L.J. C.P., p. 28.
(2) 24 Sess. Cas. (4th ser.) 530.
(3) *Wiggins* v. *Johnston*, 15 L.J. Ex. 202.
(4) *Hutchinson* v. *Tatham* (1873), 8 C.P. 482. See also *Pike* v. *Ongley*, 18 Q.B.D. 708, and *Hutcheson* v. *Eaton*, 13 Q.B.D. 861.

with whom he contracts, for falsely representing himself to have had authority (1). A person who *bona fide*, but without authority, pretends to act as agent for another, and makes a contract on his behalf with a third party, impliedly warrants to such third party that he has authority to make the contract, and if he has not that authority, he is liable to compensate the other for any loss he may sustain by being unable to enforce the contract owing to the absence of authority (2).

Rights and liabilities of an undisclosed principal.

One who enters into a charter-party in his own name is personally bound by it, although he may in fact have been acting as agent for another; and, conversely, he can personally enforce it (3). This may none the less be the case, although the existence and name of the principal may have been disclosed. But if there is a doubt as to whether the contract was made by the agent personally, or merely as a representative, the question must be settled by reference to the document, considering it as a whole, and having regard to the objects and to the relations of the parties.

Agent signing without qualification.

If the charter-party is signed by the agent in his own name without qualification, the presumption generally is that he meant to contract personally. Thus in *Parker* v. *Winlow* (4), a memorandum of charter-party was expressed to be made "between P., of the good ship *C.*, and W., agent for R. W. & Son," to whom the ship was to be addressed. It was signed by W. without any restriction. It was held that W. was personally liable as charterer. The presumption from the unqualified signature was not rebutted by the description of him as "agent" in the body of the charter-party (5). In *Hough* v. *Manzanos* (6) a charter-party was entered into between plaintiffs, shipowners, and

(1) *Jenkins* v. *Hutchinson*, 18 L.J. Q.B. 274. See per Lord Esher, M.R., *Pike* v. *Ongley*, 18 Q.B.D., p. 712.

(2) *Collen* v. *Wright*, 27 L.J. Q.B. 215; *Richardson* v. *Williamson*, L.R. 6 Q.B. 276; *Starkey* v. *Bank of England* (1903), A.C. 114; *Rederi Aktiebolaget Nordstjernam* v. *Salvesen*, 6 Sess. Cas. (5th ser.) 64; *Meek* v. *Wendt*, 21 Q.B.D. 126. But see *Lilly* v. *Smales* [1892], 1 Q.B. 456.

(3) *Short* v. *Spackman*, 2 B. and Ad. 962; and per Blackburn, J., *Fawkes* v. *Lamb*, 31 L.J. Q.B. 98; *Cunningham* v. *Collier*, 4 Doug. 233; *Breslauer* v. *Barwick*, 36 L.T. 52.

(4) 7 E. and B. 942.

(5) See also *Hick* v. *Tweedy*, 63 L.T. 765.

(6) 4 Ex. D. 104.

defendants "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading and payment of advance. In an action for breach of the charter-party, the defendants, by their statement of defence, denied their personal liability. It was held that the defendants were liable on the charter-party (1).

But the fact that the agent's signature is unqualified does not conclusively show that he contracts personally; the whole document must be considered (2). And, on the other hand, an agent may be held personally bound, although his signature has been qualified. In *Lennard* v. *Robinson* (3) a charter-party made in London was expressed to be between the shipowner and "Robinson & Fleming of London, merchants"; and throughout the document the provisions were with reference to the "said merchants." But Robinson & Fleming signed the charter-party "by authority of and as agents for M. A. H. Schwedersky, of Memel." It was held that, looking at the whole document, Robinson & Fleming contracted in it as principals.

Estoppel of person signing as agent.

In *Adams* v. *Hall* (4) the plaintiffs and defendants entered into a charter of the ship *R.* to load a cargo of deals. In the body of the charter the defendants were described as follows: "It is this day mutually agreed between Messrs J. H. & Co. of Newcastle, for owners of the good ship *R.*" The defendants signed this charter-party at the foot, as follows: "For owners, J. H. & Co." A cargo was loaded on board the ship *R.* at H., and the captain signed a bill of lading for the same, stating that he had received it in good condition, etc. The cargo was ultimately delivered to the plaintiffs at G., and was found on delivery to have been injured to the extent of £50.

(1) See also *Cooke* v. *Wilson*, 26 L.J. C.P. 16; *Price* v. *Walker*, L.R. 5 Ex. 173; *Kennedy* v. *Gouveia*, 3 D. and R. 503.

(2) *Southwell* v. *Bowditch*, 1 C.P.D. 374; *Gadd* v. *Houghton*, 1 Ex. D. 357.

(3) 24 L.J. Q.B. 275. See also *Adams* v. *Hall*, 37 L.T. 70; *Hutcheson* v. *Eaton*, 13 Q.B.D. 861; *Weidner* v. *Hoggett*, 1 C.P.D. 533; *Wake* v. *Harrop*, 31 L.J. Ex. 451.

(4) 3 Asp. M.C. 496.

In an action brought by the plaintiffs against the defendants for the damages, in the County Court, three letters which had passed between the plaintiffs and the defendants and their solicitors were admitted in evidence, and as soon as the plaintiffs' evidence was closed, the defendants' solicitor objected that there was no evidence against the defendants as principals, and applied for a non-suit, on the ground that it appeared upon the charter-party that the defendants were not principals, but only agents of the owner. The judge overruled the objection, and decided that the defendants were liable as principals. On an appeal, it was held that there was evidence to support the decision that the defendants were liable as principals. It was further held that the charter-party was to be construed as explained by the letters, and that the letters were properly admitted in evidence (1).

A person entering into a charter-party in his own name, on behalf of Government, is personally liable (2).

Liability of agent.

Where a charter-party has been made by an agent expressly on behalf of a principal, the agent is not personally liable on the contract, even though the principal be a foreign one, and although he may not have authorised the supposed agent to make the contract (3).

In a charter-party it was agreed "between D. & Son, owners of the ship *A.*, of the one part, and G. Brothers, as agents to F., of Anamaboo, merchants and charterers, of the other part, etc." The voyage, etc., was then set out; the words merchants and charterers in the plural number were printed and continued in the plural throughout the whole charter-party. It was signed "For D. & Son, of Jersey, owners; B. as agent. For F., of Anamaboo; G. Brothers as agents." It was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that G. Brothers were not liable on the charter-party as principals (4).

(1) See also *Hutchinson* v. *Tatham*, 42 L.J. C.P. 482; *Jenkins* v. *Hutchinson*, 13 Q.B. 744; *Lennard* v. *Robinson*, 5 El. and Bl. 125; *Parker* v. *Winlow*, 7 El. and Bl. 942; *Deslandes* v. *Gregory*, 2 El. and El. 602; *Wagstaff* v. *Anderson*, 49 L.J. C.P. 485; *Smith* v. *M'Guire*, 3 H. and N. 554; *Cowie* v. *Witt*, 23 W.R. 76.

(2) *Cunningham* v. *Collier*, 4 Dougl. 233.

(3) *Jenkins* v. *Hutchinson*, 18 L.J. Q.B. 274; *Lewis* v. *Nicholson*, 21 L.J. Q.B. 311.

(4) *Deslandes* v. *Gregory*, 39 L.J. Q.B. 36.

If the agent was not authorised to enter into the charter-party, no binding contract at all has been concluded; unless it can be shown that the agent had no principal at all, and was, in fact, contracting for himself; in which case, probably, he may sue or be sued on the contract (1).

Government agent.

A very important exception to the principles affecting the liability of agents on contracts made for their principals exists in the case of contracts, under seal or not, which are made by an agent of the sovereign on account of the sovereign in the public service. The agent is not liable on such a contract (2) unless he enters into the contract in his own name on behalf of the Government, when he becomes personally liable (3).

Cesser clause. Agent desiring to protect himself from liability.

If an agent is desirous of protecting himself from liability on the charter-party, he ought to contract in the name of his principal, and sign in his name, or *per procuration* of the same (4). Another way of effecting the same object, which is very common, is for a charterer or an agent of a charterer to bind himself to ship the agreed cargo, and to contract that on that being done he shall be released from any further personal responsibility. This is effected by what is termed a cesser of liability clause.

Object of cesser clause.

"A merchant who deals in commodities which are commonly sold in entire cargoes while they are afloat, may find it worth while to take a comparatively small profit or commission on a large transaction, if he can limit his responsibility to such part of the transaction as he can control personally, which is generally the loading; while a shipowner who has possession of a cargo on which he has a lien for his freight, may well be content to look to that lien rather than to the personal responsibility of a charterer who may be domiciled in a foreign country; and both parties may prefer that any disputes arising at a port of

(1) *Schmaltz* v. *Avery*, 20 L.J. Q.B. 228; *Carr* v. *Jackson*, 21 L.J. Ex. 137; *Kelner* v. *Baxter*, 2 C.P. 174. But *cf.* *Sharman* v. *Brandt*, L.R. 6 Q.B. 720.

(2) *Macbeath* v. *Heldemand*, 1 T.R. 172; *Unwin* v. *Wolseley*, *ib.* 674; *Gidley* v. *Lord Palmerston*, 3 B. and B. 275.

(3) *Cunningham* v. *Collier*, 4 Doug. 233.

(4) Per Lord Campbell, C.J., *Parker* v. *Winlow*; per Cresswell, J., *Cooke* v. *Wilson*, 1 C.B. N.S. 153, and *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36. "On account of" in the body and at the end of the name of the agent simply is held sufficient to protect from liability, *Gadd* v. *Houghton*, 1 Ex. D. 357, C.A.

discharge shall be settled on the spot at the time they arise" (1).

In construing these clauses no general principle of law is involved, but only the meaning of the particular document (2), the object of the Courts being, in each case, to find from the words used the intention of the parties. The effect of such a protective clause as that the agent's liability "shall cease as soon as the cargo is shipped," is that the agent appears to be liable to the shipowner on the contract until the shipment has been made, but not after. It does not appear to have been decided how far in such cases the contract may be enforced by the party whose liability has ceased. In *Oglesby* v. *Yglesias* (3) the charter-party contained the following clause:—"It is further agreed that, this charter being concluded by Yglesias for another party, the liability of the former in every respect, and as to all matters and things as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." It was held to protect the defendant from a claim for demurrage accrued at the port of discharge. In *Milvain* v. *Perez* (4) there was a clause in these terms:—"This charter being concluded by Messrs Perez, on behalf of another party resident abroad, it is agreed that all liability of the former in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." It was held that this clause was sufficient to protect the defendants from a claim for not loading in regular turn, a cargo under the charter-party having, in fact, been loaded by them before action but out of turn.

Construing cesser clauses.

The clause in these two cases is so comprehensive and express also in its terms relating both to past and future claims as to leave no room for doubt whether the charterer was liable to be sued by the shipowner. It is when a clause is adopted in somewhat general terms, purporting to ground the cesser of liability of the charterer upon the rights expressed to be given to the shipowner over the

(1) Abbott, 14th edit., p. 448.
(2) See per Lord Bramwell, *Gray* v. *Carr* (1871), L.R. 6 Q.B. 522, 549.
(3) 27 L.J. Q.B. 356. (4) 30 L.J. Q.B. 90.

cargo loaded, that questions have perplexed the Courts as to the cesser of liability in respect of claims not covered by the technical effect of the shipowner's conceded rights, or as to the extent of these conceded rights construed in a popular sense, in order to cover the cesser of liability to the extreme limit of the words used.

Charterer's liability to cease when ship is loaded.

The form of the *cesser* clause usually adopted is this:— "Charterer's liabilty to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage." Lord Esher said, in *Kish* v. *Cory* (1): "Three interpretations of the clause may be suggested. By the first, liability of every kind, as well for past as for future breaches, is to cease so far as the charterer is concerned. By the second, the charterer is exempted only from future liability; that is, after the loading of the ship. But in each case the shipowner can enforce his remedy against the consignee by his lien on the cargo. By the third, the charterer's liability is to cease, but only a partial remedy is given to the shipowner by the lien against the consignee; that is, he can exercise his lien for demurrage, but not for detention. If this last were the legal interpretation of the clause, I should think it so unjust that I should be prepared to overrule former decisions upon which it is based, for I cannot think it would express the real agreement of the parties; but I am inclined to think that the interpretation to be adopted at the present day is that the charterer's liability for past breaches is to cease upon loading the cargo, but the remedy of the shipowner is given against the consignee to the extent of his remedy against the charterer; that is to say, the lien is given in full for all breaches for which the shipowner would, but for this clause, have had a remedy against the charterer." The learned judge then adverts to the fact that the only breach sued for in the case before the Court was demurrage proper, accrued at the port of loading, and says that, were they in future cases to confine the remedy given to demurrage proper, it would fall far short of the justice due to the shipowner. "I feel certain," he adds, "that when the

Three interpretations may be suggested.

(1) L.R. 10 Q.B. 553. So *Franscesco* v. *Massey*, L.R. 8 Ex. 101; *Sanguinetti* v. *Pacific Steam Navigation Company*, 2 Q.B.D. 238; *French* v. *Gerber*, 2 C.P.D. 247. See the author's work on Demurrage, pp. 132–142.

occasion arises it will be held, upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that *demurrage* includes not only demurrage proper, but also that which is in the nature of demurrage, viz. detention at the port of loading."

Principal subjects of dispute.

The claims as to which disputes have arisen seem to be confined to two subjects—damages for undue detention, or for not providing a full cargo (1).

Misrepresentation by agent to principal.

Where a person, by asserting the authority of a principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it was made, it must be taken that the agent undertook that it was true, and he is personally liable to the injured person for the damage that he has sustained by loss of bargain (2).

Rescinding or varying charter-party.

If, after a charter-party has been made, another is made between the same parties inconsistent with the first, the effect of the second is to annul the former, provided no third party has in the meantime acquired an interest under the charter-party which was first made (3). But no such effect would be operated by a charter-party made by the master if the first were made by his owners; he has no implied authority to vary or rescind their charter-party (4); and the same law holds of any other agent of the charterers in respect of a charter-party made by them (5), notwithstanding the other party to the contract is consenting. If the other side were not consenting, neither principal nor agent could vary the instrument (6).

Effect of additions or alterations in charter-party.

After a charter-party is signed, any material alteration or addition to it by a party or his agent will make it null and void, though the alteration was made without any fraudulent design; and the rule is the same though the alteration is made by a stranger (7).

The Court said in *Crookewit* v. *Fletcher* (8): "It is, no

(1) See author's work on Demurrage, pp. 132–142.

(2) *Rederi Aktiebolaget Nordstjernan* v. *Salvesen*, 6 Ct. of Sess. Cas. (5th ser.) 64.

(3) *Ellis* v. *Lafone*, 22 L.J. Ex. 124, 128; *Hall* v. *Brown*, 2 Dow. 367, 375.

(4) *Burgon* v. *Sharpe*, 2 Camp. 528; *Pearson* v. *Goschen*, 33 L.J. C.P. 265.

(5) *Sickens* v. *Irving*, 29 L.J. C.P. 25; *Thomson* v. *Brown*, 1 Moore 358.

(6) *Crookewit* v. *Fletcher*, 26 L.J. Ex. 153.

(7) Parsons on Shipping, vol. i. p. 274. (8) 26 L.J. Ex., at p. 159.

doubt, apparently, a hardship that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind that to permit any tampering with written documents would strike at the root of all property, and that it is of most essential importance to the public interest that no alteration whatever should be made in written contracts, but they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration."

The rule laid down in *Pigott's case* (1) was: "That where any deed is altered in a material part, by the plaintiff himself or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing a pen through a line or through the middle of any material word, the deed has thereby become void."

Lord Denman, in his judgment in *Davidson* v. *Cooper* (2), said: "Pigott's case had never been overruled, but, on the contrary, had even extended to unsealed documents, the authorities establishing what common sense requires, that the alteration of a once-signed paper vitiates it. And in this case agreement, even after breach, after delivery to the party suing upon it, renders the agreement void."

Shipbroker's commission.

A charter-party is usually effected through the intervention of a shipbroker, and the ordinary course is for the document signed by the parties to be kept by the broker, who gives out certified copies of it as may be required. Chartering brokers who find charters for ships, or ships for employment, usually keep the original signed charter, and issue certified copies for the use of the parties. They have no authority beyond their specific instructions in each particular case. Loading brokers, who habitually procure cargoes for vessels on the berth for a certain port or trade, have power to make engagements to carry goods in the

(1) 11 Rep. 27, cited in *Crookewit* v. *Fletcher*, 26 L.J. Ex. 160.
(2) 11 M. and W. 778.

ship they load. They collect the freight on the engagements they have made, when such freight is payable at the port of loading; and they frequently supervise the stowage of the ship, though they do not accept responsibility to the shipowners for such stowage.

A broker, being personally confided in, cannot ordinarily delegate his authority to a sub-agent, or clerk under him, or to any other person. His authority, therefore, to delegate it, if it exists at all, must arise from an express or an implied assent of the principal thereto (1). Where a charter-party is completed by a broker, he usually inserts a clause stipulating that a commission (generally 5 per cent.) shall be paid to him by the shipowner, and frequently provides that it shall become due to him on the signing of the charter-party. Where the amount has not been agreed, it must be ascertained by reference to the customary rate, if there is one; and if not, upon the basis of a reasonable remuneration under the circumstances (2). Apart from special agreement, the commission is payable for the work done in obtaining the charter, and does not depend upon the freight being actually earned (3). On the other hand, nothing is payable to the broker for the trouble and expense he may have been put to, unless a binding charter-party is concluded; and this was held to be so even where the contract had gone off in consequence of the unreasonable conduct of the defendant (4). Where an agent fails to prove a custom to recover on non-completion of contract, yet, if he found a third person who was ready to contract on the terms offered by the principal, and the contract was not completed through the refusal or the inability of the principal to perform his part, the agent may recover damages for such breach of contract (5).

A broker, being personally confided in, cannot delegate his authority.

(1) *Henderson* v. *Barnwall*, 1 Y. and J. 387; *Cochran* v. *Irlam*, 2 M. and S. 301.

(2) Where the voyage was for an indefinite time. See *Holl* v. *Pincent*, 6 Moo. 228.

(3) *Hill* v. *Kitching*, 15 L.J. C.P. 251. *Cf. Winter* v. *Mair*, 3 Taunt. 531. As to broker's responsibility to owners, see *Nitrate, etc., Company* v. *Wills*, 20 T.L.R. 486.

(4) *Read* v. *Rann*, 10 B. and C. 438; *Dalton* v. *Irwin*, 4 C. and P. 289; *Broad* v. *Thomas*, 7 Bing. 991; *Moneypenny* v. *Hartland*, 1 C. and P. 352; *Hamond* v. *Holiday*, 1 C. and P. 384.

(5) *Prickett* v. *Badger* (1856), 26 L.J. C.P. 33; *Inchbald* v. *Western Neilgherry, etc., Company* (1864), 34 L.J. C.P. 15; *Thompson* v. *Clerk* (1862), 1 Mar. L. Cas. 256.

Broker entitled to commission where contract brought about through his agency.

If the contract is, in fact, brought about through the broker's introduction of the parties, he is entitled to his commission, whether he himself works the matter out or the principals complete it without his help. His introduction, however, must have been direct; it is not enough that he has mentioned the matter to somebody else, who has brought the parties together. Nor could it suffice that he had introduced the shipowner to another broker who effected a charter of the ship. A custom said to exist among shipbrokers, that the introducing broker should be paid under these circumstances, has been considered to be unreasonable (1).

In an action for brokerage on the sale of a ship, which was resisted on the ground that the sale had been effected between the principals without any material assistance from the plaintiffs, Tindal, C.J., said: "Undoubtedly a dry introduction of one man to another will not be enough; it would be absurd to say that it can be the subject of such a claim as this. But if the introduction is the foundation on which the negotiation proceeds, and without which it would not have proceeded, then the parties cannot by their agreement deprive the brokers of their just remuneration. If the plaintiffs were the middlemen or agents up to a certain time, the parties cannot afterwards deprive them of their rights" (2).

Freight obtained by means of another broker.

Where a claim for brokerage on procuring a charter for the defendant's ship was resisted, on the ground that the freight was obtained by means of another broker, and it appeared that the plaintiff had introduced the principals to each other and that the negotiation between them was still pending, when the other broker elsewhere interposed, and without naming either party to the other or the ship to the merchant, brought them to terms, and concluded the contract, Lord Abinger, C.B., said: "The usage, as stated by the plaintiff's witnesses, is this: When a broker has introduced the captain and merchant together, and they by his

(1) *Burnett* v. *Bouch*, 9 C. and P. 620; *Wilkinson* v. *Martin*, 8 C. and P. 1; *Green* v. *Bartlett*, 32 L.J. C.P. 261; *Gibson* v. *Crick*, 31 L.J. Ex. 304. As to other charters flowing from the same introduction, see *Allan* v. *Sundius*, 31 L.J. Ex. 307; *Tribe* v. *Taylor*, 1 C.P.D. 505.

(2) *Wilkinson* v. *Martin*, 8 C. and P. 1, 5; *Cunard* v. *Van Oppen*, 1 F. and F. 716.

means enter into some negotiation as to the voyage, he is entitled to commission if a charter-party be effected between them for the voyage, even though they may employ another broker to prepare the charter-party or may write the charter-party themselves." But the usage goes further. "If a broker, authorised by both parties, and acting as the agent of each, communicate to the merchant what the shipowner charges, and to the shipowner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and the charter-party be ultimately effected for that voyage, this broker is entitled to the commission; but if he does not mention names so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other." The plaintiff in that case recovered a verdict (1).

Custom for introducing broker to share commission.

In *Gibson* v. *Crick* (2) it was held that evidence of a custom as to payment of broker's commission when he introduces another broker to a shipowner, who subsequently negotiates with one of the brokers introduced, was inadmissible, on the ground that the plaintiffs' services were too remote, and that any custom which would entitle them to claim commission under such circumstances would be an unreasonable custom and bad. But where it was proposed to prove, by the evidence of shipbrokers, a custom under which the "introducing broker" is entitled to a share of commission on all business resulting from his introduction, extending to all renewals of charter, between the same parties, and it was contended that, by the usage of brokers, such custom would attach to an agreement which contained nothing inconsistent with it, it was held that there was evidence for the jury that the agreement made respecting the first ship applied to the other also, and that the question whether it did so apply ought to have been left to the jury, and that the evidence as to the alleged custom ought not to have been rejected (3). In the case of *Falkner* v. *Earle* (4) it was proved that there

(1) *Burnett* v. *Bouch*, 9 C. and P. 620, 624. See *Phillips* v. *Briard*, 1 H. and N. 21.

(2) 31 L.J. Ex. 304.

(3) *Allan* v. *Sundius*, 31 L.J. Ex. 307. See also *Kynaston* v. *Nicholson* (1863), 1 Mar. L. Cas. 350; *Wilkinson* v. *Alston* (1879), 4 Asp. M.C. 191.

(4) 32 L.J. Q.B. 124. See also *Brown* v. *Byrne*, 23 L.J. Q.B. 313.

was a custom at Liverpool of allowing a discount of three months on freights payable on all bills of lading from ports in North America. When Texas was annexed to America in 1846, the custom was in practice extended to ports in the territory. It was held that this was evidence from which a jury might infer that this custom extended to ports in California after that country was also annexed (1).

Brokers undertaking to procure a ship.

Where a shipbroker agreed with a shipowner to procure him a charter of a vessel, in consideration of the shipowner chartering the same, it was held, in an action by the shipowner against the shipbroker for breach of contract, that there was a good consideration for the shipbroker's promise (2).

Commission.

B. was an auctioneer. C. put a ship into his hands for sale, and it was agreed that if it was not sold by auction, but if a subsequent sale were effected to any person led to make an offer "in consequence of B.'s mention or publication for auction purposes," he was to be entitled to a commission. The ship was not sold by auction, but afterwards P., having been present at a conversation which led him to believe that S. would purchase the ship, wrote to B. "noting that he had the ship in his hands," to inquire the price, etc. P. then communicated with S., who ultimately became the purchaser, but not through the agency of P. It was held by the House of Lords that there was evidence to go to the jury that the sale was effected in consequence of B.'s mention or publication, within the meaning of the agreement, and that B. was entitled to his commission (3).

Earning of freight not a condition precedent.

The actual earning of freight under a charter-party is not a condition precedent to the right of the shipbroker to his commission for procuring the execution of the charter. In *Hill* v. *Kitching* (4), A., a shipbroker, procured a charter-party to be made between B., a shipowner, and C., under which the owner contracted to bring home a certain cargo, and the merchant agreed to pay freight at a specified rate, to be reduced if the ship did not arrive on or before a

(1) See also *Pike v. Ongley*, 56 L.J. Q.B. 373.
(2) *Gliddon* v. *Brodersen*, 1 Cab. and Ell. 197.
(3) *Bailey* v. *Chadwick*, 39 L.T. 429. See also *Green* v. *Bartlett*, 32 L.J. C.P. 261.
(4) 15 L.J. C.P. 251.

given date. There was no express engagement on the part of C. to ship a cargo. It was held that A. was entitled to recover from B., upon a *quantum meruit*, for his work and labour in procuring the charter to be executed, without showing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of the cargo had been shipped, and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases.

Cancellation of charter.

In *White* v. *Turnbull* (1) the plaintiff, acting as broker for the defendants, obtained a time charter for their ship upon terms of being paid a commission on all hire earned. During the currency of the charter-party litigation arose between the defendants and the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charter-party by agreement, there being no wilful act or default on the part of the defendants in bringing about this result. It was held by the Court of Appeal that, upon the true construction of the contract, the intention of the parties was that the plaintiff should not be entitled to commission if the earning of hire was prevented by reason of causes such as had, in fact, put an end to the charter-party.

Right of introducing broker to commission on future transactions.

The plaintiff, a steamship broker, introduced the defendant, a steamship broker, to certain shipowners for the purpose of engaging charters for them, and an agreement was come to between the parties. Defendant did engage charters and obtained his commission for it. The plaintiff claimed, as introducing broker, 1 per cent. commission thereon from the defendant, not only as according to custom, but as the terms of the bargain between them, those charters being renewed for the same ships and renewed commission paid to the defendants. Plaintiff also claimed, under such custom, his renewed commission. The defendants had given the plaintiff a letter acknowledging his right to commission on a particular charter, and Chief Baron Pollock had, at the trial, rejected evidence tendered by the plaintiff of a custom in support of claims

(1) 8 Asp. M.C. 406.

for further commission on a renewal of the charter of the same ship, and on the charter of a second ship between the same parties, such rejection being on the ground that the custom, even if proved, could not attach on the special agreement. In the Court of Exchequer, Lord Bramwell and Baron Martin held that the evidence was wrongly rejected. The custom sought to be proved was that the "introducing broker" is entitled to a share of commission on all business resulting from his introduction, extending to all renewals of charter, between the same parties. Both the judges, however, expressed doubts as to whether the plaintiff, if he had been allowed to produce the evidence, could have proved the custom he suggested, and Lord Bramwell added that the custom ought to be very narrowly watched. Chief Baron Pollock adhered to the view he had expressed at the trial that the evidence was inadmissible, and not only expressed agreement with the remark of Lord Bramwell, but added, such a custom ought to be restrained within reasonable limits, and expressed an opinion that the claim of an introducing broker to share commission to the end of time was of extremely doubtful legality (1).

Stipulations in charter-parties.

It is the common practice for stipulations respecting agency and commission to be inserted in charter-parties, the legal effect of which, sometimes through the ambiguity of the language used, or sometimes through the variety of usage at different ports alleged or found, is not very easily determined, or, when determined, reducible to any one general rule. This commission is payable by the ship, but the broker, not being a party to the charter-party, cannot enforce it by action upon that contract. He cannot, therefore, proceed for it against the ship under the County Courts Admiralty Jurisdiction Amendment Act (2) as a claim arising out of an "agreement made in relation to the use or hire of any ship" (3).

In *Ward* v. *Weir* (4) a charter-party provided that a ship, "now at Philadelphia and chartered for Japan,"

(1) *Allan* v. *Sundius*, 31 L.J. Ex. 307.

(2) 32 and 33 Vict. c. 51, s. 2.

(3) *The Nuovo Raffaelina*, L.R. 3 A. and E. 483. *Cf. North* v. *Bassett* (1892), 1 Q.B. 333.

(4) 4 Com. Cas. 216.

should, after discharging at Japan, proceed to British Columbia, and there load a cargo for London. The charter-party contained the following clause: "A commission of 3¾ per cent. shall be paid to charterers . . . on amount of this charter-party, on the completion of the loading, or should the vessel be lost." The ship was lost on the voyage from Philadelphia to Japan. It was held that the charterers were entitled to the commission payable to them under the charter-party (1).

Stipulation for consignment of ship.

In addition to the commission payable to brokers who effect particular charter-parties, these documents sometimes provide for the payment of another commission to other persons. Thus a charter-party may stipulate that a person who does a ship's business abroad shall be paid an agreed or a customary commission for procuring future employment of the ship.

In *Robertson* v. *Wait* (2) the plaintiffs chartered from the defendants a ship to convey a cargo from Liverpool to Calcutta under a charter-party which stipulated that the ship was to be consigned to E. & Co., Calcutta, "on the usual terms," one of which was that E. & Co. might procure the homeward freight at a commission of £5 per cent. The defendants accordingly consigned the ship to E. & Co., but made an agreement with a third party for the homeward freight. The plaintiffs, who had previously agreed with E. & Co. for a share in the commission, thereupon sued the defendants for a breach of their agreement, but were unable to prove at the trial in what proportion the commission was to be divided between themselves and E. & Co. It was held that the stipulation as to commission having been inserted for the benefit of E. & Co., the plaintiffs, notwithstanding their inability to prove their interest in the commission, were entitled to recover as trustees of E. & Co. In another charter-party outwards, the stipulation, "the ship to be consigned to charterers' agents in China, free of commission on this charter," was held to exclude a usage entitling such consignees to procure a cargo for the ship homeward, and to charge the

(1) But *cf.* *Sibson* v. *Ship Barcraig Company*, 24 Sess. Cas. (4th ser.) 91.
(2) 22 L.J. Ex. 209.

usual commission on the freight, or to charge such commission on any freight procured without default in them by the shipowner (1).

By a charter-party made between the plaintiffs and the defendant, master of an Italian vessel, it was agreed that the ship should load a cargo at Glasgow and proceed therewith to San Francisco, where she should be consigned to the charterers' agents, "inwards and outwards, paying the usual commissions". . . and so end the voyage. A final printed clause contained a stipulation that the plaintiffs' Glasgow agents should report the ship at the Custom House "on her return to her port of discharge in the United Kingdom." The vessel was duly consigned to the charterers' agents at San Francisco, who, on her arrival there, transacted the "inwards" business and received the usual commission on the "inwards" freight. They tendered to the defendant a homeward cargo, which he declined, but he offered to take a cargo to the Mexican coast, whither he was going in order to fulfil another charter. A cargo for that destination, however, could not be obtained, and the ship sailed in ballast to Mexico, and carried thence a cargo to Europe in pursuance of the other charter-party with which the plaintiffs had no concern. The plaintiffs having brought an action for breach of contract to recover, as damages, the outwards commission which would have been earned if the defendant had accepted a homeward cargo at San Francisco and brought it to Europe, as the plaintiffs contended he was bound to do, it was held that no such obligation was created by the above-mentioned clauses of the charter-party, which merely amounted to a proviso that, if the ship were engaged on a voyage "outwards," then the agents should be further employed, and should be paid commission on the "outwards" freight. Lord Bramwell said: "With respect to the clause 'the ship shall be consigned to the charterers' agents *inwards* and *outwards*, paying the usual commissions,' I take its meaning to be this: whatever would have to be done by a ship's broker if a cargo had been taken on board outwards at San Francisco, the plaintiffs' agents were to do; or if the ship

(1) *Phillips* v. *Briard*, 25 L.J. Ex. 233. See, as to the admissibility of evidence of custom when there is a written contract, *Allan* v. *Sundius*, 31 L.J. Ex. 307.

should sail in ballast, as, in fact, she did, any services required in connection with her so sailing were to be performed by those agents" (1).

Right to collect freights.

Where a ship had been addressed to a consignee who was not in a position to clear the ship, and the captain was led by the charterers to have recourse to brokers who cleared the ship and charged commission for so doing, which the captain paid on behalf of the owner, it was held that an action was maintainable by the shipowner against the charterers, who had agreed that the ship should be consigned to their agents free of commission, and the cargo cleared free of expense to the shipowner (2).

Where a ship was addressed to the charterers' agents at London, her port of discharge, a special jury found that they might claim to collect the freights, and earn a commission for so doing (3).

In *Hibbert* v. *Owen* (4), a charter made by London shipbrokers on their own account, for an *outward* voyage, contained the clause, "a commission of 5 per cent. on this charter to be paid to (the plaintiffs), to whom the vessel is to be addressed on her return to London." The case for the plaintiffs was that the clause meant that the charterers should not only *report* the ship, but do the ordinary business of the homeward cargo, *i.e.* make out the freight notes and collect the freight; and that for doing this they were entitled, in the absence of any stipulation to the contrary, to brokerage, or "address commission," at the rate of 2½ per cent. on the amount of the freight. It was left to the jury to say what the meaning of the clause was in mercantile usage, and they found that it related to the homeward voyage, and gave the plaintiffs a commission (about 1¼ per cent. on the homeward cargo) and a reporting fee of five guineas (5).

Berth-note.

Forms of contract are sometimes used by shipbrokers, known as "berth-notes." They vary in form very much,

(1) *Cross* v. *Pagliano*, L.R. 6 Ex. 9. See also *Bradley* v. *Goddard*, 3 F. and F. 638.

(2) *Russell* v. *Griffith*, 2 F. and F. 118.

(3) *Bradley* v. *Goddard*, 3 F. and F. 638. (4) 2 F. and F. 502.

(5) This verdict stood; and thus settled a question of some importance, and constant recurrence, which had long been disputed but never before litigated. *Cf.* *Meibuhr* v. *Prickard*, cited Macl., 4th edit., p. 198.

but they are intended by the brokers to free them from liability for freight and demurrage, while giving them the right to engage cargo for the ship at a profit. In a document known as a "berth-note," the defendants were described as agents who had engaged "for owner's account" for the steamer *R.*, on customary Odessa terms, a "full cargo" of grain, and were also described as charterers having the option to load the steamer at one or both of two ports. The berth-note also provided that freight was to be payable at so much "per ton on the guaranteed dead-weight capacity of 4250 tons." It was held by Collins, J., that the defendants had undertaken the responsibilities of charterers under the note (1).

(1) *S.S. Rotherfield* v. *Tweedy*, 2 Com. Cas. 84. See also *Hick* v. *Tweedy*, 63 L.T. 765.

CHAPTER IV

RULES FOR THE INTERPRETATION OF CHARTER-PARTIES

A UNIVERSAL rule of law for the interpretation of charter-parties cannot be laid down (1). No universal rule of interpretation.

Charter-parties are ordinarily made out on printed forms applicable to contracts of their respective clauses generally, the parties filling up in writing the particulars of the contract into which they are entering. It not infrequently happens that different parts of the same contract are not easy to reconcile with each other, and the question then arises which part is to give way. Charter-parties ordinarily on printed forms.

It is a well-known and recognised mercantile practice to insert in writing on a printed form the terms of the contract intended to be entered into, without striking out the printed words which are not adopted (2).

The construction of all written instruments belongs to the Court alone, whose duty it is to construe them, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts (3); and it is the duty of the jury, if a case be tried with a jury, to take the construction from the Court, either absolutely, if there be no words to be construed—as words of art, or phrases used in commerce—and no surrounding circumstances to be ascertained, or conditionally where those words or circumstances are necessarily referred to them (4). Construction of written contracts is for the Court.

Charter-parties and bills of lading are to be construed according to their sense and meaning, as collected, in the

(1) *Burton* v. *English*, 12 Q.B.D. 222.
(2) Per Lord Penzance in *Dudgeon* v. *Pembroke*, 46 L.J. Q.B. 413.
(3) Per Lord Cairns, L.C., *Bowes* v. *Shand*, 2 A.C. 455, 462.
(4) Per Cur., *Neilson* v. *Harford*, 8 M. and W. 806.

first place, from the terms used, understood in their plain, ordinary, and popular sense, unless they have generally, in respect of the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from their popular sense; or unless the context evidently points out that they must, in the particular instance, and in order to accomplish the immediate intention of the parties, be understood in some other special and peculiar sense (1).

Unless there is some ambiguity.

The construction of a charter-party or bill of lading is for the Court, unless there is mutual (2) mistake of the parties, ambiguity (3), or some peculiar meaning attached to the words of the document by reason of the custom of the trade or port to which the document relates. In these cases the presence of the mistakes or the meaning of the words will be a question for the jury, and oral evidence will be admissible to assist them (4); whether there is any ground for the admission of oral evidence on these points (5) will be a question for the Court (6). Exceptions or clauses introduced in favour of one party to the contract are to be construed most strictly against him (7).

If possible, meaning must be given to every part of contract.

In the interpretation of the charter-party a meaning must, if possible, be given to every part of it (8), unless one part is inconsistent with another part, or unless the instrument is a general form, some of the provisions of which are inapplicable to the agreement to be interpreted (9). Where one part of a written agreement is inconsistent with another part, that part which is inconsistent with the

(1) *Dimech* v. *Corlett*, 12 Moore P.C., p. 224; per Lord Esher, M.R., in *Sailing Ship Garston* v. *Hickie*, 15 Q.B.D. 580, and *Stewart* v. *Merchants' Marine Insurance Company*, 16 Q.B.D., at p. 627; *Mackill* v. *Wright*, 14 A.C., per Lord Halsbury, at p. 114; Lord Watson at p. 116; Lord Macnaghten at p. 120; *Glynn* v. *Margitson* (1893), A.C. 351; per Lord Eldon in *Robertson* v. *French*, 4 East., at p. 135; cited by Bowen, L.J., in *Hart* v. *Standard Marine Insurance Company*, 22 Q.B.D., at p. 501.

(2) *Dixon* v. *Heriot* (1862), 2 F. and F. 760.

(3) *Cf. The Curfew* (1891), P. 131.

(4) See *Aktieselkab Helios* v. *Rkman* (1897), 2 Q.B. 83.

(5) As to variation of charters or bills of lading by parol evidence, see *Thompson* v. *Brown*, 7 Taunt. 656; *White* v. *Parkin*, 12 East. 578; *Leduc* v. *Ward*, 20 Q.B.D., at p. 480.

(6) *Bowes* v. *Shand*, 2 A.C. 455, 462; *Ashforth* v. *Redford*, 9 C.P. 20.

(7) *Burton* v. *English*, 12 Q.B.D., at p. 222, per Bowen, L.J. *Cf. Norman* v. *Bennington*, 25 Q.B.D., at p. 477; *The Waikato* (1899), 1 Q.B. 56; *The Norway*, 3 Moore P.C. N.S. 245; *Hart* v. *Standard Marine Company*, 22 Q.B.D. 499.

(8) *Morris* v. *Levison*, 1 C.P.D. 157, 160.

(9) *Pearson* v. *Gaschen*, 33 L.J. C.P. 265; *Gray* v. *Carr*, L.R. 6 Q.B. 536.

general intention of the parties, as it appears from the agreement, considered as a whole, is to be rejected (1); but if neither part is inconsistent with the general intention of the parties, as it appears from the agreement, considered as a whole, and one part is in writing and the other is printed, the printed part is to be rejected (2); but if both parts are in writing or both are printed, that part which occurs last is to be rejected (3).

Where clauses inconsistent, written part preferred to printed.

A greater effect is to be attributed to the written words, if there should be any reasonable doubt upon the sense and meaning of the whole instrument, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects (4).

Greater effect given to written words.

The part which is actually and specially inserted in a printed instrument is naturally more in harmony with what the parties are intending than the other parts, although it must not be used so as to reject the residue or to make it have no effect (5).

Although a clause, by way of condition or warranty, contained in a charter-party, cannot be got rid of by reason of its being part of a printed form not adverted to expressly by the parties and intended by one of them to be omitted, yet, if the other party was aware at the time that it could not be complied with, and after showing that it was broken, treated the charter as subsisting, it will afford him no defence to an action on the charter (6).

In dealing with the construction of charter-parties in every case, it is necessary to look to what is in reality the

Intention of the parties to be considered.

(1) *Furnival* v. *Coombe*, 5 M. and G. 736; *Kelner* v. *Baxter*, 2 C.P. 174; 36 L.J. C.P. 94; *M'Collin* v. *Gilpin*, 6 Q.B.D. 516.

(2) *Alsager* v. *St. Katherine's Docks Company*, 14 M. and W. 794.

(3) *Doe* v. *Biggs*, 2 Taunt. 108.

(4) *Robertson* v. *French*, 4 East. 136; *Deslandes* v. *Gregory*, 30 L.J. Q.B. 36.

(5) *Joyce* v. *Realm Marine Insurance Company*, L.R. 7 Q.B. 583; 41 L.J. Q.B. 356. See the judgment of A. L. Smith, J., in *The Nifa* (1892), P. 418. See also *Hinton* v. *Sparkes*, 3 C.P. 161; *Moore* v. *Harris*, 1 A.C. 327; *Cross* v. *Pagliano*, L.R. 6 Ex. 13; *Jessel* v. *Bath*, L.R. 2 Ex. 267.

(6) *Dixon* v. *Heriot*, 2 F. and F. 760.

substance of the contract, and apply common sense to ascertain the meaning of the parties (1).

Effect must be given to intention.

The common and universal principle is that an agreement ought to receive that construction which its language will admit, and will best effectuate the intention of the parties, and that greater regard is to be had to the clear intent of the parties than to any particular word which may have been used in the expression of their intent (2). But a party must not only make out a possible intention favourable to his view, but must also show a reasonable certainty that the intention was such as he suggests (3).

In *Stavers* v. *Curling* (4), Tindal, C.J., said: "The rule has been established, by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way."

Means of discovering intention.

And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough in the case of *Ritchie* v. *Atkinson* (5) to be this, "that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent." One of the questions of this kind which occurs most frequently, in contracts relating to shipping, is whether a covenant be a condition precedent or an independent covenant. That is, whether a promise made by one party be such that, if he breaks it, this breach is a sufficient excuse for the entire disregard of all his promises by the other party; or is it such that, if he breaks it, the other party is still bound to his promises, but may

(1) *Bradford* v. *Williams*, L.R. Ex. 259; *Valente* v. *Gibbs*, 28 L.J. C.P. 235; *Crookewit* v. *Fletcher*, 26 L.J. Ex. 159.
(2) Per Cur., *Ford* v. *Beech*, 11 Q.B. 852, 866.
(3) Per Cur., *Pannell* v. *Mills*, 3 C.B. 625.
(4) 3 Bing. N.C. 355.
(5) 10 East. 295.

claim indemnity from him who has broken his promise (1). Erle, C.J., said: "The construction to be put on these contracts depends on the terms of the individual contract, and what we have to look to is to ascertain the intention of the parties; and whether a particular stipulation is a condition precedent, or an independent stipulation is to be ascertained by what we consider to have been the intention of the parties expressed in the instrument" (2).

Effect of stipulations often depends on legal construction.

Although the parties may enter into what stipulation they please, the effect of their stipulations often depends on the legal construction of the instrument which contains them. This construction is always made by the Court, and questions relating to it are questions of law and not of fact. All Courts, in construing any instrument, pay great regard to the intentions of the parties. This is to be gathered, if possible, from the words they use, aided by whatever evidence is admissible. And if the intention can be ascertained, it is carried into effect, provided the words used will bear this interpretation without any violation of the rules of legal construction. And in the construction of charter-parties, as of all instruments, a construction which gives effect to all the words and provisions is preferred to one which does not (3). The instrument must be construed according to its natural and grammatical meaning (4).

Not an unnecessarily strict interpretation to be given.

The construction to be given to charters is not an unnecessarily strict one, but such a one as with reference to the context and the object of the contract will best effectuate the obvious and expressed intent of the parties (5).

Mellish, L.J., in the case of the *The Teutonia* (6), remarked that: "Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties."

(1) Parsons on Shipping, vol. i. p. 319.
(2) *Seeger* v. *Duthie*, 29 L.J. C.P. 261; *Ollive* v. *Booker*, 17 L.J. Ex. 421.
(3) *Ward* v. *Whitney*, 3 Sandf. 399, 4 Seld. 422; Parsons on Shipping, vol. i. 319.
(4) *Van Baggen* v. *Baines*, 23 L.J. Ex. 215.
(5) *Dimech* v. *Corlett*, 12 Moo. P.C. 224; *Garston S.S. Company* v. *Hickie*, L.R. 15 Q.B.D. 580.
(6) L.R. 4 P.C. 171.

Otherwise, where contract not wholly in writing.

Where, however, the contract does not depend solely on written documents, the question as to what such contract was, is properly one of fact (1). But the fact of a document having been lost, so as to let in parol evidence of its contents, does not make the construction of its contents a question for the jury (2). The maxims which govern the exposition of contracts are the same at law and in equity (3); nor are they varied by the circumstance of the contract being under seal (4).

Exception to rule.

The ordinary and more extensive meaning of the words used in an agreement ought to be departed from where they involve an absurdity, or where, if so construed, they would entail upon the contractor a responsibility which it cannot reasonably be presumed he meant to assume (5). And where a person covenants to pay money or do any other act "immediately," or upon "demand," he shall have a reasonable time to do the act, according to the nature of the thing to be done (6).

Mercantile contracts.

In cases of mercantile contracts the words employed may, by usage, bear a very different meaning from their natural one; and such meaning may be made matter of evidence. Hence it is that mercantile contracts are to be construed according to the usage and customs of merchants (7). And, accordingly, when they contain peculiar expressions which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions is, although it is for the Court to decide what is the meaning of the contract (8).

And in the case of mercantile contracts, it would seem that, although such a contract points out a mode of performance, and stipulates for the manner of payment in the event of that mode being adopted, it will not be so construed as to prevent a party who performs it in a way different from that specified from maintaining an action thereon (9).

(1) *Moore* v. *Garwood*, 4 Ex. 681. (2) *Berwick* v. *Horsfall*, 4 C.B. N.S. 450.
(3) *Eaton* v. *Lyon*, 3 Ves. 692; per Lord Mansfield, C.J., *Hotham* v. *East India Company*, Doug. 272.
(4) Per Lord Ellenborough, C.J., *Seddon* v. *Senate*, 13 East. 63, 74.
(5) See *Prebble* v. *Boghurst*, 1 Swanst. 309, 329.
(6) *Toms* v. *Wilson*, 4 B. and S. 442; *Massey* v. *Sladen*, L.R. 4 Ex. 13.
(7) Per Gibbs, C.J., *Gibbon* v. *Young*, 8 Taunt. 254.
(8) See Parke, B., *Hutchison* v. *Bowker*, 5 M. and W. 535.
(9) *Reid* v. *Meniaeff*, 7 C.B. 152.

Construction should be reasonable.

The construction of the contract must be reasonable. It is no defence to an action for not accepting a cargo of oil, that the casks which contained it were not well seasoned —the subject-matter of the contract being the oil, and not the casks (1). Words which have been clearly omitted by mistake may be supplied (2).

Construction must be liberal.

The construction must be liberal—that is, the terms used in an agreement must prevail according to their most comprehensive popular sense, unless there be something to show that they were meant to be used in a sense more confined (3).

Construction should be favourable.

The construction must be favourable, so that the agreement may, if possible, be supported. If the words used in an agreement be susceptible of two senses, one agreeable to, the other against law, the former sense shall be adopted (4).

Meaning of "until," "from," "on," "upon," "to."

Thus, generally, the word "until" is considered to admit of different meanings, according to the subject-matter and context (5). "From" may be taken to mean either inclusive or exclusive (6), the rule being that, although the word "from" is, *prima facie*, exclusive, yet its real meaning must depend on the circumstances of the particular contract (7). "On" or "upon" may mean either before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason or good sense require (8); and "to" may be held to mean "towards" (9).

Popular meanings to be adopted.

As the meaning to be put on a contract is that which is the plain, clear, and obvious result of the terms used therein, so these terms are to be understood in their plain, ordinary,

(1) *Gower* v. *Van Dadelsen*, 4 Scott 453.

(2) *Waugh* v. *Russell*, 5 Taunt. 707; *Coles* v. *Hulme*, 8 B. and C. 568. See *Bancks* v. *Camp*, 9 Bing. 604; *Elliot's case*, 2 East. P.C. 951.

(3) See *Whitehouse* v. *Liverpool Gas Company*, 5 C.B. 798; *Mallam* v. *May*, 13 M. and W. 511, 517.

(4) Co. Litt. 42*a*.

(5) Per Williams, J., *Wilkinson* v. *Gaston*, 9 Q.B. 137, referring to *Rex* v. *Stevens*, 5 East. 244; and see *Isaacs* v. *Royal Insurance Company*, L.R. 5 Ex. 296, in which "until" was held to be inclusive.

(6) *Pugh* v. *Duke of Leeds*, 2 Cowp. 714; and see *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association* [1896], 1 Q.B. 402, where "from" was held to be exclusive.

(7) *Wilkinson* v. *Gaston*, 9 Q.B. 137.

(8) See per Cur., *R.* v. *Arkwright*, 12 Q.B. 960, 970; *Paynter* v. *James*, 2 C.P. 348, 354.

(9) *Colledge* v. *Hartz*, 20 L.J. Ex. 146.

and popular sense (1), unless they have, generally, in respect to the subject-matter—as by the known usage of trade or the like—acquired a particular sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instances, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special sense (2).

Meaning of "directly."

Thus, where a contract is to be performed "directly," this does not mean "within a reasonable time," but "speedily," or, at least, "as soon as possible" (3). So an agreement to do an act "forthwith" means that it shall be done "without delay or loss of time" (4); and commissions on net proceeds of a homeward cargo mean commissions only on the actual sums realised by sales (5). Instructions to a coal factor to sell coal at such a price as will realise not less than 15s. per ton "net cash," less commission, may be construed as authorising a sale on credit if a credit sale be the custom of the trade (6). The words "say about" in a charter-party for loading "a full and complete cargo, say about 1100 tons," have been held not to be satisfied by a cargo of 1080 tons in a case where the actual capacity was 1200 tons (7). "Cargo" means the entire load of the ship which carries it (8).

"Net cash."

"Say about."

Previous course of dealing.

To enable the Court to judge of the meaning of a contract, the previous course of business between the parties may be taken into account. In *Lewis* v. *G.W. Railway Company* (9), where the question was as to the effect of the words "owner's risk in a contract note," Bramwell, L.J., said: "I think it is a rule of law that where words are used which would comprehend some other than one necessarily exclusive meaning upon which the judges are to put an interpretation, then, as Parke, B., said, all the surrounding circumstances, and the course of dealing between the parties, not only may, but must, be looked

(1) See *Stanley* v. *Western Insurance Company*, L.R. 3 Ex. 71.
(2) Per Lord Ellenborough, *Robertson* v. *French*, 4 East. 130.
(3) *Duncan* v. *Topham*, 8 C.B. 225.
(4) See per Lord Chelmsford, *Roberts* v. *Brett*, 34 L.J. C.P. 241, 247, in H.L.
(5) *Caine* v. *Horsfall*, 1 Ex. 519. (6) *Boden* v. *French*, 10 C.B. 886.
(7) *Morris* v. *Levison*, 1 C.P.D. 155. See author's work on Freight, pp. 130, 131. See also "Cargo," in DEFINITIONS.
(8) *Borrowman* v. *Drayton*, 2 Ex. D. 15 (C.A.). (9) 3 Q.B.D. 195, p. 20.

at to ascertain the meaning of those words when used in reference to those surrounding circumstances and that course of dealing."

What is required in order to construe a written document.

And Brett, L.J., said(1): "I apprehend that, in order to construe a written document, the Court is entitled to have all the facts relating to it, and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the courses of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating. The Court is entitled to ask for those facts to enable it to construe the written document, not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract" (2).

Technical words.

Where a word is technical, so that special knowledge is required in order to arrive at its meaning, evidence on the point may be given, and it is for the jury to determine it (3).

Words having special trade meanings.

Again, word or phrase used may have a specially limited meaning in the trade, although it may be an ordinary well-known expression, and free from any apparent ambiguity. In such cases, evidence of its meaning may be given (4).

Again, such a phrase as "in regular turns of loading" may be shown to have a special meaning at the loading port (5).

(1) 3 Q.B.D., p. 208.

(2) See also *Heffield* v. *Meadows*, 4 C.P. 595; *Morris* v. *Levison*, 1 C.P.D. 155; *Heugh* v. *Escombe*, 4 L.T. 517; *Birrell* v. *Dryer*, 9 A.C. 345, at p. 353; *Peek* v. *North Staffordshire Railway Company*, 10 H.L. Cas. 473; *The Curfew* (1891), P. 131, where letters showing the intention were looked at; but see *The Nifa* (1892), P. 411.

(3) *Hill* v. *Evans*, 31 L.J. Ch. 457; *Birch* v. *Depeyster*, 4 Camp. 385; *Hibbert* v. *Owen*, 2 F. and F. 502.

(4) See per Lord Cairns, *Bowes* v. *Shand*, 2 A.C. 455, p. 468; *Myers* v. *Sarl*, 30 L.J. Q.B. 9; *Holt* v. *Collyer*, 16 Ch. D. 718; *Cochran* v. *Retberg*, 3 Esp. 121; *Chaurand* v. *Angerstein*, 1 Peake 61; *Cuthbert* v. *Cumming*, 24 L.J. Ex. 198, 310; *Buckle* v. *Knoop*, L.R. 2 Ex. 125; *Bottomley* v. *Forbes*, 5 Bing. N.C. 121; *Duckett* v. *Satterfield*, 3 C.P. 227.

(5) *Leidemann* v. *Schultz*, 23 L.J. C.P. 17; *King* v. *Hinde*, 12 L.R. Ir. 113; *Holman* v. *Peruvian Nitrate Company*, 5 Sess. Cas. (4th ser.) 657; *Norden* v. *Dempsey*, 1 C.P.D. 654. See also author's work on Demurrage.

Geographical terms.

In an action on a policy of insurance on a voyage "to any port in the Baltic," evidence was admitted to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated as separate and distinct by geographers" (1).

Presumption that special meaning was intended.

"Where it is shown that the term or phrase has acquired a peculiar meaning in the trade, it is, *prima facie*, to be taken as used with that meaning, unless upon construing the whole contract you can see that, either in express terms, or by necessary implication, the parties intended to use it in a different sense" (2).

Conflicting opinions as meaning.

"Conflicting opinions of individuals, as to the proper interpretation of words in a written contract, would be entitled to no weight, even if it were clear that they were admissible (3). The evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and mere opinions of persons in the trade as to what was probably intended are not relevant (4).

Words to be construed against the promissor.

Ambiguous and doubtful words of promise are construed against the person making the promise (5), and when the extent of an exception to an obligation is uncertain, it is construed against the person for whose benefit it was introduced (6).

Reasonable performance.

"The express provisions of a maritime contract generally include and govern cases of usual occurrence and not unusual events, it being implied that if such events should occur the parties shall act in a reasonable manner, having regard to the character of the contract, the usage

(1) *Uhde* v. *Walters*, 3 Camp, 15. *Cf. Birrell* v. *Dryer*, 9 A.C. 345; *Robertson* v. *Clarke*, 1 Bing. 445; *Moxon* v. *Atkins*, 3 Camp. 210.

(2) Per Blackburn, J., *Myers* v. *Sarl*, 30 L.J. Q.B. 9, at p. 16. *Cf. Holt* v. *Collyer*, 16 Ch. D. 718.

(3) Per Lord Selborne, *Birrell* v. *Dryer*, 9 A.C. 345, at p. 346. See *Bowes* v. *Shand*, 2 A.C. 455; *Carter* v. *Crick*, 28 L.J. Ex. 238; *Lewis* v. *Marshall*, 13 L.J. C.P. 193; *Abbott* v. *Bates*, 43 L.J. C.P. 150; *Levy* v. *Merchants' Marine Insurance Company*, 52 L.T. 263.

(4) *Bowes* v. *Shand*, 2 A.C. 455; *Cross* v. *Eglin*, 2 B. and Ad. 106.

(5) See *Bullen* v. *Denning*, 5 B. and C. 842; *Ireland* v. *Livingston*, L.R. 5 H.L. 395.

(6) See *Burton* v. *English*, 12 Q.B.D. 218; *The Dunbeth* (1897), P. 132, p. 136; *Blackett* v. *Royal Exchange Assurance Company*, 2 C. and J. 244; *Birrell* v. *Dryer*, 9 A.C. 345; *London Assurance* v. *Comp. de Moagens*, 167 U.S. 149 (1897); *National Bank* v. *Insurance Company*, 95 U.S. 673; *Neill* v. *Whitworth*, 34 L.J. C.P. 155; 1 C.P. 684; *Lawrence* v. *Aberdeen*, 5 B. and Ald. 107.

in like cases, if any, and the general provisions of the law" (1).

Reference to trade practices.

What is a reasonable performance may often be ascertained by reference to the ordinary practices of men engaged in the same and other kindred businesses. For example, as to the delivery of goods at a certain port: the place within the port at which delivery should be made, and the manner and time of giving it, are ascertained by reference to the practices and habits of the business men of the place. There may be no invariable practice on any of these points. In each case there may be several alternatives, all consistent with what is usual. These customary trade practices need not be either definite or uniform, and though they are of importance in showing how the agreed terms of the contract are to be understood and carried out, they cannot add other independent terms to it. Moreover, such varying practices are only some guide to what is a reasonable manner of performing the contract, whereas a definite custom imported into the contract becomes the guide and rule as to what is to be done (2). On the other hand, a definite uniform custom may be impliedly incorporated into the contract with the effect of adding terms to it (3).

A custom may add terms to the contract.

Evidence of the existence of customs or usages in a particular trade or market is admissible to import into contracts made with reference to such trade or market incidents, or additional terms, which the evidence shows to be usual, provided these are not repugnant to the expressed terms of the contract, and also to explain the

(1) Per Willes, J., *Hanson* v. *Royden*, 3 C.P. 47, at p. 50. See meaning of "reasonable" in author's work on Demurrage, pp. 50–52. See also *Ford* v. *Cotesworth*. L.R. 5 Q.B. 544, at p. 548; *Hick* v. *Rodocanachi* (1891), 2 Q.B. 626, App. 626, 638, 646; affirmed as *Hick* v. *Raymond* (1893), A.C. 22.

(2) See per Lord Blackburn, *Postlethwaite* v. *Freeland*, 5 A.C. 599, at p. 616.

(3) The following cases illustrate the bearing of customary though not uniform practices:—*Da Costa* v. *Edmunds*, 4 Camp. 142; per Tindal, C.J., *Gould* v. *Oliver*, 2 M. and G. 208, at p. 236; *Benson* v. *Schneider*, 7 Taunt. 273; *Cuthbert* v. *Cumming*, 24 L.J. Ex. 198, 310; *Haynes* v. *Halliday*, 7 Bing. 587; *Hudson* v. *Ede*, L.R. 3 Q.B. 412; *Smith* v. *Rosario Nitrate Company* (1894), 1 Q.B. 174; *M'Intosh* v. *Sinclair*, Ir. R. 11 C.L. 456; *Nielsen* v. *Wait*, 16 Q.B.D. 67; *The Brigg Fittler*, cited Ang. Carr. s. 301, *n.* See also *Noble* v. *Kennoway*, 2 Doug. 510; *Pelly* v. *Royal Exchange Assurance Company*, 1 Burr. 341; *Blackett* v. *Royal Exchange Assurance Company*, 2 C. and J. 244; *Vallance* v. *Dewar*, 1 Camp. 503; *Duckett* v. *Satterfield*, 3 C.P. 227.

meaning of expressions used in the contract. The principle upon which this evidence is admitted is that the parties did not mean to express the whole of the contract by which they intended to be bound, but to contract with reference to known usages (1). Eminent judges have often protested against the adoption of a principle which involves a departure from the actual contract made, but the rule has long been definitely settled (2). The usage need not be ancient. Trade usages, for instance, are constantly coming into existence, and they change from time to time. They are binding on parties, because the parties are presumed to have intended to be bound by them. The usage must be general; that is to say, it must be the rule in all cases to which it is applicable, and where it is not expressly, or by implication, excluded by the parties (3). Evidence of a number of instances in which the alleged usage has been acted upon must usually be given (4)—that is, unless the usage is judicially recognised—and the witnesses should be asked whether they know of actual instances where the rule has been followed in disputed cases (5). A practice which is merely common, but is not the definite and binding rule, is not a usage to be imported into a contract, or referred to, to govern its construction (6).

Usage must be reasonable.

The usage must be reasonable, and a usage which alters the nature of the contract is unreasonable, as, for instance, if it enables the other party to settle the account with the agent of the contracting party by set off of the agents' personal debt (7). But if a party knows that a usage prevails in a particular market, and he chooses to deal there either personally or through a broker, without expressly excluding it, the Court would be very reluctant to find the usage so unreasonable as not to bind him. Evidence may be given to show that a usage relied on is

(1) *Hutton* v. *Warren*, 1 M. and W. 466.

(2) See per Lord Denman, in *Trueman* v. *Loder*, 11 Ad. and E., at p. 597.

(3) *Wildy* v. *Stephenson*, C. and E. 3; *Nelson* v. *Dahl*, 12 Ch. D., at p. 576; *Willans* v. *Ayres*, 3 A.C., at p. 145.

(4) *Mackenzie* v. *Dunlop*, 3 Macq. H.L. Cas. 22.

(5) *Knight* v. *Cotesworth*, C. and E. 48.

(6) *Abbott* v. *Bates*, 43 L.J. C.P. 150.

(7) *Pearson* v. *Scott*, 9 Ch. D. 198; *Perry* v. *Barnett*, 15 Q.B.D. 388; *Robinson* v. *Mollett*, L.R. 7 H.L. 802.

unreasonable (1), not only because the Court may decide that it is too unreasonable to be imported into the contract, but also because the jury may decline to find the existence of the usage as a fact. But if the parties agreed to incorporate a particular usage in their contract, it is immaterial whether the usage is reasonable or not (2).

May bind persons ignorant of the custom.

It is not necessary that the party bound should have known of the usage, if he dealt in the market where it prevailed, or authorised his agent to deal there (3). Blackburn, J., said in *Mollett* v. *Robinson* (4): "I think it is now thoroughly established that a person who deals in a general market is bound to inquire what the usages are, and that those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belonged to the place. He is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to know." But a custom must be well known outside the particular trade or place where it is adopted, or it cannot bind persons who are ignorant of it (5). It ought to be "so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to have been aware of it" (6). In *Bartlett* v. *Pentland* (7) Lord Tenterden said: "As to the supposed usage at Lloyd's; the usage in a particular place, or of a particular class of persons, cannot be binding on other persons unless those other persons are acquainted with that usage and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs; on the contrary, there is everything to rebut such a presumption" (8).

(1) *Bottomley* v. *Forbes*, 5 Bing. N.C. 128.

(2) *Stewart* v. *West Indian S.S. Company*, L.R. 8 Q.B. 68, 362.

(3) *Sutton* v. *Tatham*, 10 A. and E. 27; *Bayliffe* v. *Butterworth*, 1 Ex. 425; *Buckle* v. *Knoop*, L.R. 2 Ex. 125; *Norden S.S. Company* v. *Dempsey*, 1 C.P.D. 662.

(4) 7 C.P. 84, at p. 111. (5) See *Rushworth* v. *Hadfield*, 7 East. 224.

(6) Per Borill, C.J., *Grissell* v. *Bristowe*, 3 C.P. 112, at p. 128.

(7) 10 B. and C. 760, at p. 770.

(8) See *Gabay* v. *Lloyd*, 3 B. and C. 793; *Hathesing* v. *Laing*, L.R. 17 Eq. 92; *Plaice* v. *Allcock*, 4 F. and F. 1074.

Charter-party conclusive as to the terms of the contract.

By the general rule of the law of evidence, a charter-party is conclusive as to the terms of the contract, and what is not in the charter cannot be part of the terms. To this there is an exception that customs of trade are tacitly incorporated in the contract, though not expressed in it, provided the express terms of the writing are not inconsistent with the custom so as to exclude it (1).

Parol evidence of usage not admissible to vary a charter-party.

Parol evidence of mercantile usage is not admissible to vary the terms of a charter-party (2). But evidence of custom may be used to explain ambiguous mercantile expressions in a charter or to add incidents or to annex usual terms and conditions which are not inconsistent with the written contract between the parties (3).

Custom of merchants judicially settled.

The custom of merchants, where such custom has been settled by judicial determination, will be recognised without proof in courts of law (4).

Mercantile contracts are very commonly framed in a language peculiar to merchants. The intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large; evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. In *French* v. *Newgass* (5), Brett, L.J., said: "There is a rule of construction that unless words are of a technical character they must be construed according to their ordinary and grammatical meaning; and there is another rule that you cannot, by any evidence, import into any contract anything contradictory or inconsistent with its terms. If the words are technical, you may add to them by evidence of a custom not inconsistent with them. But if there is no evidence of any technical use or any custom to add anything to the words as they stand, the words must be construed according to their ordinary grammatical construction."

Words must be construed according to their ordinary meaning.

Usage must not be repugnant to expressed terms.

The usage must not be repugnant to the expressed terms of the contract, or to a necessary implication from them,

(1) *Robinson* v. *Mollett*, L.R. 7 H.L. 802.
(2) *Phillipps* v. *Briard*, 25 L.J. Ex. 233.
(3) *Browne* v. *Byrne*, 23 L.J. Q.B. 313.
(4) *Burnett* v. *Brandao*, 6 M. and G. 630.
(5) 3 C.P.D. 163; 47 L.J. C.P. 361.

for evidence is only admissible upon the presumption that the parties contracted with reference to it, and upon the assumption that the terms of the contract as expressed by them "were intended to be supplemented by all those varying and general incidents which a uniform usage would annex" (1). Usage cannot alter or control the law, for instance, by making an instrument negotiable (2).

A custom must be reasonable.

"When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person, in fact, ignorant of it, is unreasonable, contrary to law, and void" (3).

A general custom contrary to law is invalid.

A custom prevailing universally throughout a trade is invalid if it is in conflict with a rule of law or is inconsistent with any settled legal principle (4); but it is valid if it deals with a matter on which there is no settled rule of law, and after repeated proof of it in the Courts, the Courts will recognise it without further proof (5).

(1) *Humfrey* v. *Dale*, 7 El. and Bl. 266.

(2) *Cronch* v. *Crédit Foncier*, L.R. 8 Q.B. 374.

(3) Per Brett J., in *Robinson* v. *Mollett*, L.R. 7 H.L. p. 818. See also *Todd* v. *Reid*, 4 B. and A. 210; *Scott* v. *Irving*, 1 B. and Ad. 605; *Sweeting* v. *Pearce*, 30 L.J. C.P. 109; *Matrieff* v. *Crosfield*, 8 Com. Cas. 120; *Stewart* v. *Aberdeen*, 4 M. and W. 211; *Sea S.S. Co.* v. *Price*, 8 Com. Cas. 292; *Marwood* v. *Taylor*, 6 Com. Cas. 178; *Fawcett* v. *Baird*, 10 T.L.R. 198; *Gibson* v. *Crick*, 31 L.J. Ex. 304; *Walters* v. *Shaw* (1904), 2 K.B. 152; *Leuckhart* v. *Cooper*, 3 Bing. N.C. 99; *Cropper* v. *Cook*, 3 C.P. 194; *Seymour* v. *Bridge*, 14 Q.B.D. 460; *Perry* v. *Barnett*, 14 Q.B.D. 467; *Allan* v. *Sundius*, 31 L.J. Ex. 307. Custom as to lightening, see *The Alhambra*, referred to under "Port" in DEFINITIONS. See also *Good* v. *Isaacs*, L.R. 2 Q.B. 555.

(4) See *Atwood* v. *Sellar*, 5 Q.B.D. 286; *Meyer* v. *Dresser*, 33 L.J. C.P. 289; *Partridge* v. *Bank of England*, 15 L.J. Q.B. 395; *Hawkins* v. *Cardy*, Carthew 466; *Suse* v. *Pompe*, 30 L.J. C.P. 75; *Edie* v. *East India Company*, 2 Burr. 1226; *Oppenheim* v. *Russell*, 3 B. and P. 42.

(5) *Poingdestre* v. *Royal Exchange Corporation*, By. and M. 378; *Stephens* v. *Australasian Insurance Company*, 8 C.P. 18; *In re Witt, Ex parte Shubrook*, 2 Ch. D. 489; *Naylor* v. *Mangles*, 1 Esp. 109; *Spears* v. *Hartley*, 3 Esp. 81; *Holderness* v. *Collinson*, 7 B. and C. 212.

Opinions of business men.

Buller, J., said in *Lickbarrow* v. *Mason* (1): "We find, in *Snee* v. *Prescot*, that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country." Settled principles which have been to a great extent founded upon usages and opinions of mercantile men, have become part of the law, and the Courts endeavour to develop these principles in a consistent manner as the new circumstances of commerce require. But where new questions arise, the Courts have to be informed how they are regarded and dealt with by business men in order to give the right effect to transactions respecting them.

The custom must relate to the subject-matter of the contract.

In order that a custom may be incorporated into a contract, it must relate to the subject-matter of that contract (2). In *Cockburn* v. *Alexander* (3) it was held that parol evidence was not admissible to show that, by the custom of the place of loading, the cost of pressing wool was to be borne by the shipowner.

The custom must be consistent with the contract.

If the custom is inconsistent with any agreed terms, the parties must be taken to have excluded it (4). In

(1) 2 T.R. 63, at p. 73.

(2) *Phillips* v. *Briard*, 25 L.J. Ex. 233. (3) 6 C.B. 791.

(4) *Brown* v. *Byrne*, 23 L.J. Q.B. 313: *Hutchinson* v. *Tatham*, 8 C.P. 482; per Lord Halsbury in *Tancred* v. *Steel Company of Scotland*, 15 A.C. 125, p. 137; *Royal Exchange Shipping Company* v. *Dixon*, 12 A.C. 11; *Humfrey* v. *Dale*, 27 L.J. Q.B. 390; *Fleet* v. *Murton*, L.R. 7 Q.B. 126; *Barrow* v. *Dyster*, 13 Q.B. P. 635; *Falkner* v. *Earle*, 32 L.J. Q.B. 124.

Gulf Line v. *Laycock* (1) wool was shipped in Australia for delivery in this country under bills of lading which provided that freight was "to be paid on delivery in cash, without deduction, on gross weight at Queen's beam." The shipowner alleged that, by the custom of the trade, the consignee had the option of having the goods weighed at his own expense, or of taking the goods without weighing at the bill of lading weight, plus 2 per cent. It was held that there was no such custom as alleged, and that, if there had been such a custom, it would have been bad in law as contradicting the express terms of the bill of lading (2).

Local customs.

"Where a custom is purely local, it cannot be taken to control or explain the words of a written instrument unless it was known to the parties" (3). But where a custom is habitually observed by those engaged in a particular trade, it is presumed that it is adopted by those who go into that trade (4).

In *Norden S.S. Company* v. *Dempsey* (5), by a charter-party made at Riga, the plaintiff's ship was to proceed, with a cargo of timber, to Liverpool, and to deliver at such docks there, as ordered, on arrival. On arrival at Liverpool the ship duly entered into dock, but, in consequence of the crowded state of the dock, was unable for some days to obtain a berth alongside the quay from which she was allowed to discharge. It was held that, in an action for demurrage, evidence was admissible tending to show that, by the custom of the port of arrival, timber ships were not considered to have arrived until they had obtained a discharging berth within the dock. Coleridge, C.J., said: "Principle and authority have alike, as I have said, decided that, where the question is, at what spot or place within a large port, according to the usage of the

(1) 7 Com. Cas. 1.

(2) *Hayton* v. *Irwin*, 5 C.P.D. 130; *Nielsen* v. *Wait*, 16 Q.B.D. 67; *Metcalfe* v. *Thompson*, 18 T.L.R. 706. See also *Blackett* v. *Royal Exchange Assurance Company*, 2 C. and J. 244; *Dickenson* v. *Jardine*, 3 C.P. 639; *Miller* v. *Tithering-ton*, 31 L.J. Ex. 363; *Hall* v. *Janson*, 24 L.J. Q.B. 97.

(3) Per Lord President Inglis, 5 Sess. Cas. (4th ser.), p. 671. *Cf. Hick* v. *Tweedy*, 53 L.T. 765; *Gill* v. *Browne*, 53 Fed. Rep. 394.

(4) *Bottomley* v. *Forbes*, 5 Bing. N.C. 121; *Buckle* v. *Knoop*, L.R. 2 Ex. 125; *Marzetti* v. *Smith*, 49 L.T. 580.

(5) 45 L.J. C.P. 764.

port, ships may be said to have arrived, so as to construe the word 'arrival' in a contract relating to that port, evidence ought to be given, and has been given repeatedly, upon the obvious ground that it is not contradicting the contract, but explaining it, and because 'arrival' at a port may mean many things; and if, by the usage of the port, 'arrival' means, not arrival within its ambit, but arrival at a certain definite place or locality, evidence is allowed to be given to show such custom."

Brett, J., said (1): "If a ship is considered at Liverpool to be an 'arrived' ship, you cannot alter the rights of the shipowner, upon a contract made at Riga, by showing that at Liverpool there is a custom not to charge demurrage until the ship is at quay berth" (2).

(1) 45 L.J. C.P., p. 770.
(2) See also *Brereton* v. *Chapman*, 7 Bing. 559.

CHAPTER V

Representations in a Charter-Party

What is a representation?

Properly speaking, a representation is a statement or assertion made by one party to the other, before, or at the time of the contract, of some matter or circumstance relating to it (1). Although it is sometimes contained in a written instrument, it is not an integral part of the contract, and, consequently, the contract is not broken though the representation proves to be untrue, nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue (2). Although representations are not usually contained in the written instrument of contract, yet they sometimes are, but their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation or whether it is a substantive part of the contract. This is a question of construction which the Court, and not the jury, must decide. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract

(1) *Gwillim* v. *Daniel*, 2 C.M. and R. 61; *M'Connel* v. *Murphy*, L.R. 2 N.C. 203.

(2) *Elliott* v. *Von Glehn*, 13 Q.B. 632; *Wheelton* v. *Hardisty*, 8 E. and B. 232. But see *Barker* v. *Windle*, 25 L.J. Q.B. 349.

is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages.

A charter-party usually commences with a description of the ship, giving her nationality, character, class, and capacity, and some statement of where she is lying, or how she is occupied, at the time the contract was entered into. These are representations made by the shipowner, and they may amount to warranties or promises by the shipowner that the facts are as represented, or they may be mere recitals identifying the subject-matter of the contract, or bare representations which only become significant when it is sought to show that the charterer has been induced to contract by misrepresentation.

Representation may amount to a condition precedent.

A representation may not only be a warranty that the fact is as represented, so as to make the shipowner liable in damages for a failure to satisfy it, but it may also amount to a condition precedent to the charterer's obligation to load. The fact represented may be so material to him that that obligation will become a substantially different thing from what he meant to undertake, if it prove untrue. In that case he will, on discovering the truth, be at liberty to refuse to load (5).

"With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour (6). If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly perhaps, ceases to be

(5) *Behn* v. *Burness*, 32 L.J. Q.B. 204; *Bentsen* v. *Taylor* (1893), 2 Q.B. 274.

(6) Per Williams, J., *Behn* v. *Burness*, 32 L.J. Q.B. 204, at p. 206. *Cf. Barnard* v. *Faber* (1893), 1 Q.B. 340.

available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

Definition of a "condition."

A condition is a term of an agreement the non-fulfilment of which gives the party for whose benefit it was inserted the right to repudiate the agreement (1).

Definition of a "warranty."

A warranty is a term of an agreement the non-fulfilment of which gives the party for whose benefit it was inserted a cause of action, but not a right to repudiate the agreement (2).

Express conditions. Classification of ship.

All iron or steel vessels are classed A, with a numeral prefixed, so long as on careful annual and periodical surveys they are found to be in a fit and efficient condition to carry dry and perishable cargoes to and from all parts of the world. The numerals prefixed to the letter A, such as 100 A or 95 A, are intended for the purpose of comparison only, and denote their relative strength. The words descriptive of the quality of the ship, as, for instance, that she is A 1, amounts to a warranty, and is a material part of the contract. If, therefore, the ship is stated in the charter-party to be A 1, and proves to have been of an inferior class at the time the charter-party was entered into, the charterer would not be bound to load (3).

A statement in a charter-party of the class of the vessel amounts only to a condition precedent that the ship at the time of making the charter is actually so classed (4), and not that she is rightly so classed (5), or that she will continue to be so classed during the term of the charter-party (6). Thus where in a charter-party a vessel was described as "A 1½ Record of American and Foreign Shipping Book," and at the time the charter-party was entered into she was on the register as stated, but before the charterer had loaded her this classification was cancelled, the charterer was held liable for refusing to load her (7).

(1) *Graves* v. *Legg*, 9 Ex., at p. 716; *Bettini* v. *Gye*, 1 Q.B.D., at p. 188.
(2) *Chanter* v. *Hopkins*, 4 M. and W., at p. 434; *Behn* v. *Burness*, 3 B. and S., at p. 756.
(3) *Ollive* v. *Booker*, 17 L.J. Ex. 21. See also judgment in this case.
(4) *Routh* v. *Macmillan*, 2 H. and C. 750.
(5) *French* v. *Newgass*, 3 C.P.D. 163. (6) *Hurst* v. *Usborne*, 18 C.B. 144.
(7) *French* v. *Newgass*, 3 C.P.D. 163.

As to place where vessel is lying.

A statement in a charter-party as to the place where the vessel is lying is a condition precedent. Thus where a ship was described in a charter-party as being "now in the port of Amsterdam," it was held, in an action brought by the shipowner against the charterer for not loading an agreed cargo, that these words amounted to a condition precedent to the charterer's liability to load (1).

A statement in a charter-party as to the time when a vessel has sailed is a condition precedent. Thus where in a charter-party a vessel was described as "now at sea, having sailed three weeks ago," it was held, in an action by the shipowner against the charterer, that these words amounted to a condition, and that as the vessel had sailed a week subsequently to the time stated, the charterer was justified in refusing to load (2).

Tonnage.

Tonnage is the carrying capacity of a ship expressed in cubic tons. Until 1836 the tonnage of British ships was found by multiplying the square of the breadth by the inboard length and then dividing by 94. This is now called the "old measurement" (O.M.), and though far from exact, is still in use to some extent for ascertaining the tonnage of pleasure yachts, etc. As the cubic ton of 100 cubic feet forms the unit of assessment for dock, harbour, and other dues, towage, etc., and as by the old system the depth of a ship was reckoned the same as the breadth, it became the interest of shipowners to build vessels of narrow beam but of increased depth. This resulted in a saving in tonnage dues, but marred the sailing qualities and seaworthiness of the ships. In 1836 a new and more exact system of measurement was established by Act of Parliament in the preceding year. In this system, known as the "Moorsom System," as amended and elaborated in detail in later enactments, actual measurements of depth are made at certain intervals, the number of which depends on the length of the tonnage-deck of the vessel, and transverse areas at these points are computed, all measurements being put in feet and decimal parts of a foot. These transverse areas, after being multiplied by certain numbers, are added together, multiplied by one-third the common distance between the areas, and then divided by 100. To this must

How measured.

Moorsom System.

(1) *Behn* v. *Burness*, p. 351. (2) *Ollive* v. *Booker*, 1 Ex. 416.

be added the tonnage of all spaces above the tonnage deck, the poop (if any), deck-houses, etc., which is obtained by multiplying the horizontal area by the mean height and dividing by 100 as before. These together give the *gross register tonnage*, each ton (called a *register ton*) containing 100 cubic feet. In steamships the space occupied by the engine-room and the screw shaft (which is considered a part of the engine-room) is to be deducted. The British system of measurement was adopted by the United States in 1864, and later by Denmark, Austria-Hungary, Germany, France, Italy, Spain, Sweden, the Netherlands, Norway, Greece, Russia, Finland, Hayti, Belgium, Japan, etc., and in its essentials by the International Tonnage Congress which met at Constantinople in 1873 in connection with fixing the basis for tolls for vessels passing through the Suez Canal. As applied in these different countries, there are slight differences in the rules for the deduction of engine-room tonnage, and in the United States the number of transverse areas is greater. In freighting ships 40 cubic feet of merchandise is considered a ton unless that bulk would weigh more than 2000 pounds, in which case freight is charged by weight. For payment of freight the ton is sometimes calculated at some specified number of cwt. less than twenty.

Gross register tonnage.

A ton for freight purposes means 2000 lbs.

The term "tons weight or measurement" means that goods shipped are to be taken either by weight of 20 cwt. or by measurement of 40 cubic feet. Whether goods are to be treated as weight or measurement goods for freight, is at the option of the shipowner.

It depends upon the circumstances under which and the manner in which the contract is made, whether the statement of the ship's measurement in the charter-party amounts to a promise and to a condition precedent. If the misdescription is very gross, it may be evidence of fraud (1). If the shipowner wrongly states the capacity of the ship for a particular cargo, it is a misdescription which may be very material to the charterer's calculations, and if he be so minded, he may repudiate the contract *in toto*, provided it has not been partially executed in his favour.

Tonnage of vessel.

(1) *Behn* v. *Burness*, 32 L.J. Q.B. 204; *Bentsen* v. *Taylor* (1893), 2 Q.B. 274.

Thus the defendants in Bombay chartered a ship from the plaintiff which was described in the charter-party as of the measurement of about 2700 to 2800 tons net register. The ship had never been in Bombay, and was wholly unknown to the defendants. Evidence was given that in the negotiations for the charter-party the plaintiff stated to the defendants that the ship was certainly not more than 2800 tonnage register. She, however, turned out to be of the registered tonnage of 3045 tons, and the defendants refused to accept her in fulfilment of the charter-party. It was held (*a*) that the representation in the charter-party as to the tonnage of the vessel was intended to be a substantive part of the contract between the parties; (*b*) that the statement in the contract was a condition precedent, of which the defendants were entitled to avail themselves whether or not they would have suffered loss had they accepted the ship; (*c*) that the fact justified the defendants in repudiating the contract (1).

Statement of tonnage does not definitely indicate her carrying capacity.

But a mere statement of the vessel's measured tonnage does not definitely indicate her carrying capacity, and a mistake in stating it may not always be material. For example, in *Hunter* v. *Fry* (2) the charterer loaded only 336 tons in a ship which, although described as "of the burden of 261 tons or thereabouts," could have carried 400 tons of the agreed cargo. It was held that the shipowner was entitled to compensation for the loss of freight that would have been earned had the charterer loaded a full cargo.

Opinion of Chief Justice Abbott.

Abbott, C.J., said: "I am of opinion that the mention of a ship's burden in the description of a ship in the charter-party in the manner it is here mentioned is an immaterial circumstance, although it may be made material by the allegation of fraud or other matter. Here the freighter has not covenanted to load a cargo equivalent to the burden mentioned in the charter-party; he has covenanted to load and put on board a full and complete cargo, and to pay so much per ton for every ton loaded on board. If the covenant had been to pay a gross sum for the voyage, the freighter (upon the arrival of the ship at

(1) *The Oceanic Steam Navigation Company* v. *Soonderdas Dhurumsey*, I.L.R. 15 Bom. 389.

(2) 2 B. and Ald. 421. See also *Thomas* v. *Clarke*, 2 Starkie 450.

the foreign port) might have insisted that the captain should take on board as much as the ship would safely contain; and the owner, who had covenanted to take a full and complete cargo, would not be justified in saying that he would take no more than the register tonnage of the ship. It is, indeed, quite impossible that the burden of the ship (as described in the charter-party) should in every case be the measure of the precise number of tons which the ship is capable of carrying. That must depend upon the specific gravity of the particular goods; for a ship of given dimensions would be able to carry a larger number of tons of a given species of goods that were of a great specific gravity than she would of another of a less specific gravity" (1).

Where a steamer was described as "of the measurement of 1033 tons register and carrying 2000 tons or thereabouts," it was held that the representation of carrying capacity related to cargo, apart from bunker coal, and that the shipowners were bound to take 2000 tons of cargo or thereabouts (2).

Verbal representation as to carrying capacity.

During negotiations for the chartering of a vessel, the owner's agents represented that the vessel had carried a certain quantity of cargo. The charterers acted on the representation, which, in fact, was untrue, and entered into a charter-party containing no reference to the previous cargo. It was held that the representation being untrue, the charterer could recover as for a breach of a collateral verbal warranty (3).

"To load a full and complete cargo."

A statement in a charter-party, under which the charterer is bound to load a full and complete cargo of the capacity of the ship, is a representation merely and not a warranty. Thus where in a charter-party, under which the defendant was bound to load a complete cargo of coals, the ship was described as "of the measurement of 180 to 200 tons or thereabouts," it was held that these words amounted to a representation only, and that the defendant was bound to load a complete cargo although the vessel was of the measurement of 257 tons (4).

(1) See also *Barker* v. *Windle*, 25 L.J. Q.B. 349, and see judgments in this case.
(2) *The Resolven*, 9 T.L.R. 75. See "Cargo" in DEFINITIONS.
(3) *Hassan* v. *Runciman & Co.*, 10 Com. Cas. 19.
(4) *Barker* v. *Windle*, 6 E. and B. 675. See also *Hunter* v. *Fry*, 2 B. and Ald. 421.

Jervis, C.J., said: "In these mercantile contracts a representation of this sort forms so far a warranty as to entitle the party to have the thing contracted for. Had the ship supplied to the defendant been of 1000 tons in size, *ultra* the tonnage stated in the charter-party, it would not have been the thing he contracted for. A representation of this sort is not absolutely and positively a warranty. If it were, the excess of a ton or half a ton in size would be fatal to the contract. A representation in a charter-party is a condition precedent, or not, according to this, whether it does or does not enter into and affect the substance of the contemplated voyage. In any circumstances, the party is entitled to have what he has bargained for. Here it is agreed on all hands that the defendant has had the ship he contracted for. He was, therefore, bound to load it" (1).

The charterer's engagement usually is to load "a full and complete cargo not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture." The cargo to be either of lawful merchandise generally or of some named kinds. The obligation to load a full cargo ought to be expressed, if the charterer is to be bound to do so.

Implied condition that vessel shall be used for charterers' purpose only.

In a charter-party for a voyage, where it has been provided in terms that the vessel should load a full cargo over "tackle, apparel, provisions, and furniture," there is an implied condition that the ship shall be used for the charterers' purpose only. Thus where more coal was taken on board the vessel than was necessary for the particular voyage, and expense was incurred in unloading the extra amount of coal taken in, the charterers must pay such expense (2).

Cargo must be packed in the manner usual at the port.

A full and complete cargo of any specified kind of goods means a cargo of such goods packed or dealt with in the manner usual at the port of loading (3). The charterer was bound to load at Trinidad a full and complete cargo of sugar and molasses. He loaded as many hogsheads of sugar and puncheons of molasses as the ship could carry,

(1) 25 L.J. Q.B. 349.
(2) *Darling* v. *Raeburn*, 1907, 1 K.B. 846.
(3) *Graves* v. *Legg*, 11 Ex. at p. 645. See also *Benson* v. *Schneider*, 1 Moore 21.

though there were vacant spaces in which more sugar and molasses, if packed in barrels and tierces, could have been carried; and it was proved that, by a custom at Trinidad, a cargo is a full and complete cargo of sugar and molasses if it is a full and complete cargo of sugar packed in hogsheads and molasses packed in puncheons, as sugar and molasses so packed come of better quality and with less loss. It was held that the charterer had performed his agreement, and that the shipowner should have stipulated for payment of freight for broken stowage, if he wanted to be paid for it (1).

Agreement to load "a full and complete cargo, say about ——— tons."

If a charterer agrees to load "a full and complete cargo, say about" so many "tons," he is bound to load only a full and complete cargo if a cargo of fewer than the number of tons named would be a full and complete cargo, and only a cargo of about the number of tons named if a cargo of the number of tons named would not be a full and complete cargo (2).

"Cargo" applies to goods, not passengers.

"A full cargo," *prima facie*, refers to goods and not to passengers (3).

Charterer not entitled to load the cabin.

The provision in a charter-party that the ship shall load "a full and complete cargo" does not entitle the charterer to load the cabin (4).

"Not exceeding what she can carry."

Such words as "not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture," following the clause which provides that the vessel shall load from the factors of the charterer a full and complete cargo, are words of exception in favour of, not of obligation upon, the shipowner (5).

Where shipowner bound to provide cargo.

The words in a charter-party relating to the ship loading a cargo will be interpreted as imposing upon the shipowner instead of the charterer the obligation of providing the cargo, if the context shows that this was the intention of the parties. A charter-party provided that the ship was to proceed to one of the guano islands and there load a cargo of guano free from dirt and rubbish, and in as dry a

(1) *Cuthbert* v. *Cumming*, 24 L.J. Ex. 309. See *Hunter* v. *Fry*, 2 B. and Ald. 421. See "Tonnage of Vessel."

(2) *Morris* v. *Levison*, 1 C.P.D. 155. See also *Bourne* v. *Seymour*, 24 L.J. C.P. 202. See "Cargo" under DEFINITIONS.

(3) *Lewis* v. *Marshall*, 7 M. and G. 129.

(4) *Mitcheson* v. *Nicol*, 7 Ex. 929. (5) *Gould* v. *Oliver*, 2 M. and G. 208.

state as practicable, by the ship's boat and tackle, and by the labour of the crew, the charterer to ship bags and other materials for loading the ship. It was decided that the shipowner was to provide and load the cargo, on the grounds that a cargo of guano is distinct in its nature from any other cargo, because to obtain it nothing more is necessary than the personal labour of the crew; that the unusual provision that the cargo should be loaded by the labour of the crew tended to show that something more than the mere labour of loading from alongside, which is comprised in the simple undertaking to load, was intended; that the stipulation that the guano should be free from dirt and rubbish and as dry as practicable would have been unnecessary if it were the charterers who had to provide the cargo, as would also have been the stipulation as to the charterers shipping materials requisite for loading the ship; and that there was no provision that the ship was to load from the factors or agents of the charterers, nor were there any lying days for loading, although there were for unloading (1).

Statement as to the amount of cargo.

A statement in a charter-party, under which the charterer is bound to load a particular specified cargo, of the amount of that cargo, is a representation and not a warranty. Thus where by a charter-party it was agreed that a ship should proceed alongside a hulk at a foreign wharf, and "take on board therefrom the cargo put on board thereof, and forming the cargo brought by the *Oriente*, being 470 tons of guano, more or less"; it was held that these latter words amounted to a representation only, and not to a warranty, and that the charterers had fulfilled their obligation though the cargo on board the hulk amounted only to 344 tons (2).

Charterer not excused loading through inability.

In the absence of any words restricting his liability, the charterer is liable if he does not load a cargo, even if his inability to do so arose from a cause over which he had no control (3).

Charterer not bound to load a quantity equal to that destroyed.

If the charterer has loaded a part of the cargo, and that part is destroyed on board by fire or otherwise, he is not

(1) *Hills* v. *Sughrue*, 13 M. and W. 253.

(2) *Gibbs* v. *Grey*, 2 H. and N. 22.

(3) *Barker* v. *Hodgson*, 3 M. and S. 267; *Postlethwaite* v. *Freeland*, 5 A.C., at pp. 619, 620. See "Excuses for Non-Performance," Chap. VII.

bound to load over again a quantity equal to the part destroyed (1).

If the charterer has the option of loading different kinds of goods.

If the charterer is by the charter-party required to load a full and complete cargo of one or more out of several kinds of goods therein enumerated, and he loads as large a cargo of one of the kinds of goods as the ship can take on board, he fulfils his agreement, although the ship might have carried a larger quantity of cargo if the charterer had loaded a cargo consisting partly of one of the other kinds of goods (2).

Words implying that charterer is to fill ship.

But if there are words in the charter-party which imply that the charterer is to fill the ship, he does not fulfil his agreement by loading as large a cargo of one of the kinds of goods enumerated as the ship can take on board, if vacant space is left which might have been filled with cargo of another kind.

A charter-party provided that the ship should load from the charterer's agents a full and complete cargo of sugar or (3) other merchandise, the charterer to pay freight so much for sugar per ton, according to the ports for which the ship should be ordered, the same rates for rum per tun, and per load for timber: "other goods, if any, should be shipped to pay in proportion to the foregoing rates, except what might be shipped for broken stowage, which should pay as customary." The charterer loaded the ship with a cargo of mahogany logs, as many as the vessel could carry, but a space was left between them which might have been filled up with broken stowage, and in consequence the master was compelled to keep on board 30 tons of ballast to trim the ship. It was held that the charterer had not complied with the charter-party, for as the owner was bound to receive broken stowage, a correlative obligation on the part of the charterer to supply it, when required to fill the ship, must be implied (4).

By a charter-party made between the plaintiffs and the

(1) *Jones* v. *Holm*, L.R. 2 Ex., p. 338.

(2) *Irving* v. *Clegg*, 1 B.N.C. at 57. See also *Moorsom* v. *Page*, 4 Camp. 107, approved of in *Southampton Steam Colliery Company* v. *Clarke*, L.R. 6 Ex. at p. 58; *Cole* v. *Meek*, 15 C.B. N.S. at p. 802.

(3) "Or" in the *Law Journal Reports*; "and" in the *Common Bench Reports*.

(4) *Cole* v. *Meek*, 15 C.B. 795; 33 L.J. C.P. 183. See *Southampton Steam Colliery Company* v. *Clarke*, L.R. 6 Ex., at p. 58.

defendants, it was agreed that the defendants should load a full and complete cargo of "wet wood pulp" on the plaintiffs' steamer, paying freight at a rate per ton. The cargo was to be loaded in winter at a port where severe frosts occur. The cargo was delivered to be loaded in a frozen condition, and in consequence it was possible to stow only a much smaller quantity than if it had been unfrozen. The plaintiffs claimed damages for short shipment of cargo. It was held by the Court of Appeal that the defendants had not broken their contract to load a full and complete cargo (1).

Guarantee as to ship's capacity.

It is now settled that a statement in a charter-party that a ship is of a specified register tonnage is a matter of description, and is not a warranty that she is of that exact tonnage. If the misdescription is very gross, it may be evidence of fraud (2), or possibly the charterer may refuse to load the vessel on the ground that she is not the thing he bargained to have, but if the description is practically complied with, the charterer is bound to accept her (3).

Dead weight.

The number of tons of 20 cwt. a vessel will lift is called her "dead-weight capacity," "dead weight," "draw," or "capacity." "Capacity" is also applied to the "room" or number of cubic feet available for stowage in the holds of a ship, which may differ materially from the weight she can lift without putting her Plimsoll mark or load-line under water.

Guarantee of capacity as to particular voyage.

A guarantee by a shipowner of a ship's carrying capacity being so much "dead weight," is a guarantee of the vessel's carrying capacity with reference to the contemplated voyage and the description of the cargo proposed to be shipped, so far as that description was made known to the owner (4).

Oral evidence may be received to show the force of the phrase (5).

Dead weight preventing cargo from being loaded.

It is not an implied term of a charter-party, under which the shipowner is to load dead weight for the owner's

(1) *Isis Steamship Company* v. *Bahr, Behrend, and Others*, 8 Asp. M.C. 569.
(2) See *Behn* v. *Burness*, 32 L.J. Q.B. 205.
(3) *Windle* v. *Barker*, 25 L.J. Q.B. 349. See also "Cargo" in DEFINITIONS.
(4) Per Lord Macnaghten, *Mackill* v. *Wright*, 14 A.C. 120. See also *Carnegie* v. *Conner*, 24 Q.B.D. 45; *The Norway*, 13 L.T. 50.
(5) *Cunningham* v. *Dunn*, 48 L.J. C.P. 62.

benefit, that the dead weight shall be of such a character that, on her proceeding to another port to load the cargo provided by the charterer, it will not prevent that cargo being loaded. At all events if the charterer, before the dead weight is loaded, knows of and does not object to its being loaded, and the shipowner does not know that the character of the dead weight will prevent the cargo provided by the charterer from being loaded. By a charter-party it was agreed that the vessel should, after loading dead weight at Malta for owner's benefit, proceed to a first-class Spanish port as ordered, and there load a cargo from the charterer's agent, it being declared that by "first class" was meant any port that a steamer with cargo from a foreign port could load at without risk of detention by the Custom House authorities; the shipowners intended that the vessel should load at Malta military stores as part of the dead weight, and the charterer was aware of this intention, and that in Spain permission to load a cargo on a vessel containing military stores might be refused, but the shipowners believed that permission to load would be obtained; the vessel loaded military stores at Malta, and proceeded to a Spanish port to load as ordered, but as permission to load could not be obtained, she sailed away without loading. It was held that the charterer could not recover against the shipowners, because "there was no warranty that the dead weight should be such as to allow the vessel to be loaded," and because the "shipowners did not know at the time of entering into the charter-party that they would disable themselves from taking on board the plaintiff's cargo," and because "the plaintiff gave the defendants license to sail to the Spanish port with the military stores on board" (1).

By a charter-party made between the respondents and the appellants, it was agreed that the appellants' vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment, not exceeding what she could reasonably stow and carry, etc." It was provided that the freight should be a lump sum of £2200, and the charter-party contained this guarantee: "Owners guarantee that the

(1) *Cunningham* v. *Dunn*, 3 C.P.D. 443, at pp. 447, 448.

vessel shall carry not less than 2000 tons dead weight," and this provision: "Should the vessel not carry the guaranteed dead weight as above, any expenses incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." The cargo intended to be carried was a general cargo consisting in part of railway locomotive machinery, and a note was, by consent of the parties, written upon the margin of the charter-party specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. The charterers tendered a cargo not in excess of 2000 tons dead weight, consisting of railway machinery, including locomotives and tenders, two parcels of coals, and general goods. The large pieces of machinery were much more numerous than specified in the marginal note. The vessel sailed with only 1691 tons dead weight. It was not disputed that she contained a carrying capacity up to the guarantee; and it was admitted that 2000 tons dead weight of the cargo tendered could not have been carried on the vessel unless the coal had been packed with the machinery, which was not done. The charterers claimed a deduction in the freight. It was held by the House of Lords that the marginal note amounted to a representation, and the cargo being such a cargo as was not contemplated, and the fact being that the vessel carried less than the guaranteed dead weight because the charterers tendered large machinery in excess of their representation, they were not entitled to the benefit of the stipulation for reduction of the freight, and the whole lump freight was payable. It was also held that the stowage of coal among machinery without the consent of the shippers of the machinery and of the coal was not proper stowage, and that it was the duty of the respondents, and not the duty of the appellants, to obtain such consent (1).

Marginal note.

Lord Macnaghten said (2): "It is a charter for the hire of a vessel for a lump sum from Glasgow to Kurrachee. It has a note in the margin as to the description of part of the proposed cargo, and it contains this guarantee, 'Owners guarantee that the vessel shall carry not less than

(1) *Mackill* v. *Wright*, 14 A.C. 106. (2) *Ib.* p. 120.

2000 tons dead weight of cargo.' In effect, the charterers say to the owners, 'We want a vessel to carry to Kurrachee a general cargo, including parcels of machinery; we give you the dimensions and number of the largest pieces; will your vessel carry 2000 tons dead weight?' The owners say, 'It will.' That is, I think, something more than a mere guarantee of carrying capacity. It is a guarantee of the vessel's carrying capacity with respect to the contemplated voyage and the description of the cargo proposed to be shipped, so far as that description was made known to the owners."

In *Potter* v. *New Zealand Shipping Company* (1) the defendants sub-chartered a ship from the plaintiffs, the chartered owners. The ship was to load a part cargo of nickel ore in New Caledonia. By the sub-charter it was agreed that she was then to proceed to New Zealand, where the defendants were to load "a cargo of any sort of lawful merchandise, say $\frac{5000}{5600}$ tons," and the plaintiffs guaranteed the defendants "between 5000 and 5600 tons space" after the ore was loaded. The ship arrived from New Caledonia with a vacant space of 5450 tons, and the defendants loaded a cargo which left a space of 901 tons unfilled when the ship was down to her marks. In an action for freight on the whole 5450 tons space, it was held that it was the defendants' duty to load the ship with measurement goods so that the entire vacant space should be filled, and that freight was due from them to the plaintiffs on the whole vacant space of 5450 tons.

If there is nothing in the contemplated voyage or the contemplated cargo to give any special meaning to the guarantee, it will be treated as a guarantee of the carrying capacity of the ship without reference to any particular cargo.

Guarantee of capacity without reference to any particular voyage.

A charter-party, which provided that the ship should "load a cargo of creosoted sleepers and timbers," contained the following clauses: "Charterer has option of shipping 100/200 tons of general cargo"; and "Owners guarantee ship to carry at least about 90,000 cubic feet or 1500 tons dead weight of cargo." It was held that the latter clause did not amount to a warranty that the ship should be able

(1) 64 L.J. Q.B. 689.

to carry about 90,000 cubic feet of the description of the cargo which the charterer was under the previous clauses entitled to tender, but was merely a warranty of the carrying capacity of the ship (1).

Nationality of ship.

A misstatement of the vessel's nationality may be very material to the charterer, either in time of war, as bearing upon her neutrality or otherwise (2), or in time of peace, with reference to the navigation laws of the places where she may be intended to trade, or with reference perhaps to the question by what rules of law the effect of the contract is to be determined.

Vessel to sail with all convenient speed.

Undertakings in a charter-party that a vessel shall sail with all convenient speed (3), or shall sail within a reasonable time, or shall sail with the first favourable wind (4), are warranties only.

With convoy.

A statement in a bill of lading that the vessel is bound for her port of destination "with convoy," is a warranty that she will sail with convoy (5).

Description of a vessel as a steamship.

A description in a bill of lading of the vessel as a steamship, amounts to a warranty that steam shall be the principal motive power during the voyage (6).

As to the time of sailing.

A provision in a charter-party that a ship shall sail on or before a certain date is a condition precedent. Thus where by a charter-party it was provided that a ship should proceed to Trieste and there load a full cargo, etc., "the vessel to sail from England on or before the 4th February," was a condition precedent to the charterer's liability to load (7).

Implied conditions.

In every agreement to carry goods in a ship, whether that agreement is a charter-party or bill of lading, or in any other form, there is, in the absence of any express provisions to the contrary, implied (if it is not expressed)

(1) *Carnegie* v. *Conner*, 24 Q.B.D. 45. See also *Societa Anonyma Ungherese* v. *Tyser Line*, 8 Com. Cas. 25; *Pust* v. *Dowie*, 34 L.J. Q.B. 127. See judgment of Blackburn, J., 33 L.J. Q.B. 172.

(2) *Lothian* v. *Henderson*, 3 B. and P. 499.

(3) *M'Andrew* v. *Chapple*, 1 C.P. 643; *Behn* v. *Burness*, 3 B. and S. p. 754.

(4) *Bornmann* v. *Tooke*, 1 Camp. 377.

(5) *Sanderson* v. *Busher*, 4 Camp. 54, noting *Phillips* v. *Baillie*, 3 Dougl. 374.

(6) *Fraser* v. *Telegraph Construction Company*, L.R. 7 Q.B. 567.

(7) *Glaholm* v. *Hays*, 2 M. and G. 257. See also *Crookewit* v. *Fletcher*, 1 H. and N. 293.

an undertaking that the ship shall be fit for its purpose, that is, be seaworthy (1).

Seaworthy.

Implied condition of arrival within time.

It is an implied condition in a charter-party, if no time be named, that the vessel shall arrive at the port of loading, or, if she is at the port of loading, shall be ready to receive the cargo, within such a time that the object for which it was chartered shall not be frustrated (2). Thus where it was provided by the charter-party that the vessel should proceed with all convenient speed from Liverpool to Newport and there ship a cargo of iron rails, and before the vessel reached Newport she was so much damaged that she had to return to Liverpool for repairs, and the jury found that the time necessary for repairing her was such as to make it unreasonable for the charterers to supply the agreed cargo without putting an end, in a commercial sense, to the speculation, it was held that the charterers were not bound to load (3).

Vessel must be fit to carry the cargo named.

Where a particular cargo has been named in a charter-party, it is an implied condition that the ship shall be reasonably fit to carry it. Thus where a charter-party gave the charterer the option of loading either sugar in bags or wet sugar, and he loaded a cargo of wet sugar, which the jury found was a reasonable cargo, but the ship was not reasonably fit to carry it, and it had to be unloaded, in an action by the shipowner against the charterer for refusing to provide a cargo, it was held that it was an implied condition that the ship should be reasonably fit to carry a cargo of wet sugar, and that the charterer was not liable (4). The implied condition will not be excluded by a provision in the charter-party that the ship before and when receiving cargo shall be a good risk for insurance, and that a surveyor's report shall be procured declaring her so (5).

No unreasonable delay.

There is an implied warranty in all charter-parties and bills of lading (if there is no express agreement as to time)

(1) *Kopitoff* v. *Wilson*, 1 Q.B.D. 377; *Steel* v. *State Line S.S. Company*, 3 A.C. 72; *The Glenfruin*, 10 P.D. 103. See also *Tarrabochia* v. *Hickie*, 1 H. and N. 183; *Havelock* v. *Geddes*, 10 East. 555; *Thompson* v. *Gillespy*, 5 E. and B. 209.

(2) *Jones* v. *Holm*, L.R. 2 Ex. 338.

(3) *Jackson* v. *The Marine Insurance Company*, 10 C.P. 125. See *Dahl* v. *Nelson*, 6 A.C., at 53, 61, 62.

(4) *Stanton* v. *Richardson*, 9 C.P. 390. (5) 9 C.P., at p. 391.

that there shall be no unreasonable or unusual delay in commencing the voyage (1).

No unnecessary deviation.

There is an implied warranty in all charter-parties and bills of lading that the vessel shall proceed without unnecessary deviation in the usual course (2). The owner of the goods may recover for a loss occurring during the deviation, although it is possible that the same loss might have happened if there had been no deviation (3). But whether he could recover for a loss happening after a deviation, and not proved to have been the consequence of the deviation, remains to be decided (4).

What is a deviation?

It is not a deviation if the master delays to sail for a reasonable time or deviates from the direct course in order to avoid an imminent danger, such as a tempest or capture by the enemy (5), or to decide as to the best course to pursue (6), or to save life; but it is a deviation if he goes out of the direct course to save property (7).

Ship must be seaworthy.

There is an implied warranty that the ship shall be seaworthy when she sails after being loaded. Therefore, where a vessel was chartered for a voyage from the port where she was lying to another port where she was to load, and she was seaworthy at the date of the charter-party, and at the date of her arrival at the port of loading and when she commenced loading, but from some unknown cause became unseaworthy before she sailed, it was held that the shipowners were liable to the charterer, although it was found that they were not guilty of negligence in sending her to sea in the condition in which she was (8).

By a charter-party for the carriage of frozen meat, shipowners were to be exempted from liability for unseaworthiness or unfitness, provided reasonable means were taken to provide against unseaworthiness, and the shipowners were not to be liable for any damage to goods "which is capable of being covered by insurance, or which

(1) *M'Andrew* v. *Adams*, 1 B.N.C., at p. 38.
(2) *Davis* v. *Garrett*, 6 Bing. 716; *M'Andrew* v. *Adams*, 1 B.N.C., at p. 38; *Scaramanga* v. *Stamp*, 4 C.P.D., at p. 318.
(3) *Davis* v. *Garrett*, 6 Bing., at pp. 723, 724.
(4) *Scaramanga* v. *Stamp*, 5 C.P.D., at p. 299.
(5) *Pole* v. *Cetcovich*, 9 C.B. N.S., at p. 437; *The San Roman*, L.R. 5 P.C. 301.
(6) *The Teutonia*, L.R. 4 P.C. 171.
(7) *Scaramanga* v. *Stamp*, 5 C.P.D. 295.
(8) *Cohn* v. *Davidson*, 2 Q.B.D. 455.

has been wholly or in part paid for by insurance"; and at the end of a long clause which contained numerous exceptions, it was provided that the above-mentioned exceptions should apply, whether the same be directly or indirectly caused or should arise by reason of the neglect of certain persons for whose defaults the shipowners would otherwise be liable. In an action claiming damages against the shipowners for failing to carry the cargo safely, the jury found that the ship, at the commencement of the voyage, was unfit to carry her cargo safely to its destination, that reasonable means were not taken to prevent such unfitness, and that the neglect was the neglect of the shipowners, their officers, and agents. The charterers were partly covered by insurance, and were paid the insurance moneys. It was held by the House of Lords that the clause was too ambiguous to exempt the shipowners from liability, and that therefore they were liable (1).

Voyage prevented by an excepted cause.

It is an implied provision of a charter-party or bill of lading that, if the further prosecution of the voyage is prevented by an excepted cause, the shipowner will do his best to protect the interest of the owner of the goods. Therefore if he cannot, or does not, choose to tranship the goods and send them on in another vessel in order to earn the freight, he must, if the circumstances will admit of it, find another vessel and forward them to their destination (2).

Terms which will not be implied.

It is not an implied condition in a charter-party or bill of lading that, if the further prosecution of the voyage is prevented by one of the causes excepted, the shipowner will repair the vessel so as to enable her to continue the voyage (3).

Vessel not bound to carry an unreasonable cargo.

If the charter-party does not mention the particular kind of cargo which the charterer is to load, the shipowner is not bound to receive a cargo which it is not reasonable for the charterer to offer. Thus the shipowner would not be bound to receive pieces of machinery of such enormous size that they could not be got into the hold, if it was of ordinary size, without altering the construction of the ship (4).

(1) *Nelson Line* v. *James Nelson* (No. 2), 24 T.L.R. 114.
(2) *Atwood* v. *Sellar*, 4 Q.B.D., at p. 358.
(3) *Worms* v. *Storey*, 11 Ex., at p. 430.
(4) Per Bovill, C.J., *Stanton* v. *Richardson*, 7 C.P., at pp. 428, 431.

Even if the charter-party mentions the particular kind of cargo, but provides that the charterer is to put it in the vessel, and stow it at his own expense and risk, the shipowner is not liable if the ship, without alteration, is incapable of carrying it, at all events if there is anything in the surrounding circumstances which shows that it is the intention of the parties that the charterer should make any alterations which are necessary to fit the ship to carry the cargo offered (1).

Unfitness to receive cargo.

It is not an implied term of a charter-party that the ship shall be free from suspicion of unseaworthiness or unfitness to receive cargo. A ship was chartered to load a cargo of tea; she carried antimony ore as ballast, and the charterer refused to load on the ground that the tea would be injured by the presence of the ore, this being the opinion of the charterer and many other persons, but, in fact, it would not have been injured. It was held that the charterer was not justified in refusing to load (2).

(1) *Bleck* v. *Balleras*, 3 E. and E. 203.
(2) *Towse* v. *Henderson*, 4 Ex. 890.

CHAPTER VI

PROCEEDING TO THE PORT OF LOADING

Voyage to be commenced without delay.

UPON general principles, in all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage, and after it has been commenced no deviation. All the authorities concur in stating that the voyage must be commenced within a reasonable time (1). In many cases it may be difficult to say what is a reasonable or an unreasonable time for commencing a voyage; the contract should therefore be referred to, in order to ascertain whether the voyage performed is in accordance with the contract. The time of sailing may make the whole difference to the charterer as to the insurance of his goods. Therefore, the master who has undertaken to sail within a reasonable time from the loading of his ship, is to sail at once. "Reasonable time" means reasonable having regard to the weather and the possibility of moving the ship (2). In *Hudson* v. *Hill* (3) it was held that to proceed "forthwith" only meant "without unreasonable delay" (4).

Time fixed for sailing.

Where a charter-party definitely fixes a time before which the ship is to sail for the port of loading, or by which she is to arrive there, the stipulation is of the essence of the contract, and the charterer, if he cannot have the use of the vessel for the specified voyage, is not bound to take her for any other voyage. So in a time charter, if the

(1) *Freeman* v. *Taylor*, 8 Bing. 124; *Mount* v. *Larkins*, 8 Bing. 108.

(2) *Oriental S.S. Company* v. *Taylor*, 63 L.J. Q.B. 128; *MacAndrew* v. *Adams*, 1 Bing. N.C. 29.

(3) 43 L.J. C.P. 273; *Roberts* v. *Brett*, 34 L.J. C.P. 241.

(4) See "Forthwith" and "Immediately" in DEFINITIONS.

charterer cannot have the vessel for the specified time, he is not bound to take her for a shorter time, or a substantially different time, but may throw up the charter, and the shipowner becomes liable for damages.

In *Glaholm* v. *Hays* (1) a ship was chartered "to sail from England" for the port of loading "on or before the 4th February next"; she delayed sailing until the 22nd, and then proceeded. It was held that the charterer was entitled to refuse to load. And in *Crookewit* v. *Fletcher* (2) the charterer was exonerated, although the sailing by the fixed date was prevented by bad weather, amounting to an act of God, and although the act of God was expressed to be "throughout the charter-party always excepted." Martin, B., said (3): "Then does the word 'throughout' make any difference? We think that it does not. It might, perhaps, operate to exonerate the plaintiff from an action in the event of the ship being prevented from sailing on the 15th March by any of the matters excepted; but we think it does not affect the condition precedent, upon the performance of which the defendant contracted to take and load the ship" (4). Such indefinite expressions as that the ship shall "proceed immediately" are read as negativing an intention to make time the essence of the contract (5).

Vessel must be ready to load.

The shipowner must place his ship at the disposition of the charterer, so as to initiate the liability of the latter, whatever it may be, to take his part as to loading. In every case it is a condition precedent to such right of the shipowner to place his ship at the disposition of the charterer for such purpose, that the ship should be at the place named in the charter-party as the place whence the carrying voyage is to begin, and that the ship should be ready to load, so far as the ship's part of the operation of loading is concerned (6).

Prevented by stress of weather from arriving.

Where the charter-party gave the charterer the option of refusing to load if the ship did not arrive at the port of

(1) 10 L.J. C.P. 98. (2) 26 L.J. Ex. 153.
(3) 26 L.J. Ex., p. 159. (4) See *Tully* v. *Howling*, 46 L.J. Q.B. 388.
(5) *Forest Oak Company* v. *Richard*, 5 Com. Cas. 100; *Rosaco* v. *Pitch Pine Lumber Company*, 121 Fed. Rep. 437; *Giuseppe* v. *Manufacturers' Export Company*, 124 Fed. Rep. 663.
(6) *Nelson* v. *Dahl*, 12 Ch. D. 568, 581. As to meaning of "Ready to Load," see DEFINITIONS.

loading by 28th November, unless "prevented by stress of weather or other unavoidable impediment," and owing to adverse wind and bad weather she did not arrive until 20th January, the charterer was not entitled to refuse to load her, although the ship had been to an intermediate port, and had taken the full usual time in discharging there. Tindal, C.J., held that the charterer's option did not arise if ordinary diligence had been used, even though the delay might have been avoided by unusual efforts (1).

Upon charters for loading the ship in remote places across the seas, options providing for the acceptance or rejection of the charter are to be exercised at the place where the ship is to load, and the ship has no right to call upon the charterer to exercise his option elsewhere (2).

Ship must still go, where option to reject.

A shipowner covenanted that his ship should sail from M. for W., and the charter-party contained a proviso that if the ship should not arrive at W. by a day named, the freighter should be at liberty to load her or not, as he pleased. In an action by the freighter against the shipowner for not sailing for W., the defendant pleaded that he was prevented by weather from sailing and arriving at W. by the day named. It was held that the defendant was liable, having undertaken that his ship should arrive by the day named (3). But in *Bucknell* v. *Tatem* (4) the vessel was at another port unloading, and was delayed in doing so for so long that it became impossible for her to arrive at the agreed port by the specified date. The charterer refused to extend the time for cancellation, or to promise to load the vessel if she proceeded to the agreed port, and said that, if he did load, the rate of freight must be reduced, and he insisted on the vessel proceeding to the agreed port. The shipowner thereupon refused to send his vessel there. It was held by the Court of Appeal that an injunction ought not to be granted to restrain the shipowner from using the vessel for any purposes other than

(1) *Granger* v. *Dent*, M. and M. 475.
(2) *The Samuel W. Hall*, 49 Fed. Rep. 281.
(3) *Shubrick* v. *Salmond*, 3 Burr. 1637. See also *The Progress*, 50 Fed. Rep. 835.
(4) 83 L.T. 121.

those of the charter-party, and the charterer was left to his remedy in damages.

Diligence required even where no date for arrival named.

In all cases of maritime transactions expedition is the essence of the contract. Unless it be otherwise expressly agreed, performance must follow within reasonable time, or without any unnecessary delay, even if no time is fixed for sailing to, or arriving at, the loading port (1).

The charterer must name the port of loading before sailing, and without delay.

Where the loading port is not named in the charter-party, but remains to be determined by the charterer, he must, subject to special agreement, name it before he can require the ship to sail (2). Where a loading port has to be named under a charter for a full cargo, the charterer must name a place where a full cargo can be safely taken (3). If the charterer delays unreasonably in naming the port (4), he will be liable for the shipowner's loss by the detention of the ship. Where by the terms of a charter-party of a vessel bound for M., it was agreed that the vessel should, after delivering her outward cargo, with all convenient speed proceed to such one of certain specified ports as should be ordered at M., and there load from the factors of the charterer a full and complete cargo, etc., and therewith proceed to the United Kingdom, it was held, that it was incumbent on the charterer to give orders as to the sailing of the vessel within a reasonable time after her arrival at M., and that he was liable to an action for delaying to do so, though it did not appear that the vessel had discharged her outward cargo (5).

Delay in naming port.

The master of a ship, under a charter-party to load a cargo at a foreign port and thence proceed to a port in Great Britain as ordered, is not bound, in default of orders, to wait at the foreign port until he has communicated with the charterer (6).

Orders to more than one port.

In *Brown* v. *Johnson* (7) a charter-party provided that a ship was to proceed to Honduras and there load, "at one of the usual and customary ports or places of loading, includ-

(1) *M'Andrew* v. *Adams*, 1 Bing. N.C. 29; *cf. Gill* v. *Browne*, 53 Fed. Rep. 394.
(2) *Rae* v. *Hackett*, 12 M. and W. 724.
(3) *Charpentier* v. *Dunn*, 15 Sc. L.R. 726; *Ohlsen* v. *Drummond*, 4 Dougl. 306; *Bradford* v. *Williams*, L.R. 7 Ex. 259.
(4) See "Port" in DEFINITIONS. (5) *Woolley* v. *Reddelien*, 12 L.J. C.P. 152.
(6) *Sieveking* v. *Maas*, 25 L.J. Q.B. 358. See also *French* v. *Gerber*, 2 C.P.D. 247; *Poles* v. *Cetcovich*, 30 L.J. C.P. 102.
(7) Car. and M. 440.

ing the rivers Ulna and Dulce," a cargo of mahogany and logwood. The freighter, by letter, directed the captain to proceed to Belize, in the Bay of Honduras, and address himself to Mr S., "who will furnish you with a homeward cargo of mahogany and logwood, agreeable to charter-party." The captain took the ship to Belize, where Mr S. put a small quantity of logwood on board and directed the ship to go to Ulna, where about half a cargo was put on board. Mr S. then sent the ship to two other places of loading in Honduras, at which the cargo was completed. It was held that it was a question for the jury whether the ship was sent to Belize as her port of loading; and that if she was, the freighter was liable for the extra expenses of her going to all the other places for the residue of her cargo; but that if Belize was not to be considered her port of loading, Ulna certainly was, and the freighter would at all events be liable for the extra expense of her going for cargo to other places after Ulna, as by the charter-party the freighter was to load at one of the usual ports or places of loading in Honduras.

To proceed to A., and there load.

If the charter-party describes a larger place, as a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship arrives at that named place, and, so far as she is concerned, is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but in the absence of his right to place his ship only as near to the named place as she can safely get, he cannot place his ship at the disposition of the charterer so as to initiate the liability of the latter as to the loading, until the ship is at the named place, or the place which, by custom, is considered to be intended by the name; as, if a larger port be named, the usual place in it at which loading ships lie. If it describes a more limited place, as a quay or quay-berth, or a particular part of a port or dock, then the shipowner may place his ship at the disposition of the charterer when the ship is arrived at that place ready, so far as she is concerned, to load, but not until the ship is at that place. The further right of the shipowner as to the loading is, of course, his right to insist on the liability of the charterer, whatever that may be,

which attaches when and after the ship is duly placed at his disposition (1).

The statement in a charter-party that the vessel is to arrive at a named port ready to load by a certain date, is a condition precedent, the non-fulfilment of which entitles the charterers to exercise the option of cancelling the charter-party, and the clause, excepting dangers and accidents of the seas, applies only to the voyage (2).

So where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her, in time for the July convoy, provided she arrived out and was ready by the 25th June, it was held that, as she did not arrive out till after the 25th June, the freighter was entirely discharged from his contract to furnish a cargo. Where, however, the default of which the freighter complains does not go to the whole consideration for his contract, and he has derived some benefit from the use of the ship, the covenant broken on the part of the shipowner is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages (3). Therefore, if the voyage has been performed, it is no defence to an action for the stipulated freight to show the breach of a covenant to sail with the first wind (4), or to sail direct to the port of distinction (5), or to sail with the first convoy on the intended voyage (6), or that the ship should forthwith be made tight and staunch (7), or that the master should take on board a full and complete cargo (8).

To proceed to a ready quay-berth.

Where a charter-party contained a clause that the vessel was to proceed to London or Tyne Dock, "to such ready quay-berth as ordered by charterers," on arrival of the ship at the Milwall Docks, London, a delay occurred by reason of there being no quay-berth ready to receive her. She discharged part of the cargo into lighters, and the

(1) Per Brett, L.J., *Nelson* v. *Dahl*, at p. 582. See the judgments of the judges in the Court of Appeal in *Leonis S.S. Co.* v. *Rank* (1908), 1 K.B., p. 510, where all the cases relating to "arrival at the port of loading" are reviewed.

(2) *Smith* v. *Dart*, 54 L.J. Q.B. 121.

(3) *Shadforth* v. *Higgins*, 3 Camp. 385.

(4) *Constable* v. *Cloberie*, Palm. 397. (5) *Bornmann* v. *Tooke*, 1 Camp. 377.

(6) *Davidson* v. *Gwynne*, 12 East. 381. (7) *Havelock* v. *Geddes*, 10 East. 555.

(8) *Ritchie* v. *Atkinson*, 10 East. 295.

remainder when she got into a quay-berth. The plaintiffs claimed a lien on the cargo in respect of such delay, and deposited the cargo with the dock company with notice not to deliver the same until payment of the amount claimed. The defendants, who were the owners of the cargo by virtue of certain delivery orders from the charterers or their assigns, claimed delivery of the cargo, and having paid to the company the amount claimed by the plaintiffs, gave the company notice not to part with the same, as they disputed the plaintiffs' lien. It was held that the defendants were liable for the amount claimed, as the word "ready" was introduced into the charter-party for the protection of the plaintiffs; and that the defendants were in the same position as the charterers, who, under the charter-party, were bound to name a quay-berth to receive the ship as soon as she was ready to proceed there (1).

In the construction of charter-parties this question has been often raised with reference to stipulations that some future thing shall be done, or shall happen, and has given rise to many nice distinctions.

Loading not excused by delay in proceeding.

A charterer is not generally entitled to refuse to load because the shipowner neglects to proceed to the port with diligence (2), unless the delay frustrates the intended adventure. In *MacAndrew* v. *Chapple*, Willis, J., said (3): "It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this Court, that a delay or deviation which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that, gives an action for damages, but does not defeat the charter" (4).

And in *Krell* v. *Henry* (5), Vaughan Williams, L.J., said:

(1) *Harris* v. *Jacobs*, 54 L.J. Q.B. 492.

(2) *Tarrabochia* v. *Hickie*, 26 L.J. Ex. 26; *Dimech* v. *Corlett*, 12 Mo. P.C. 199. See also *Clipsham* v. *Vertue*, 13 L.J. Q.B. 2; *Forest Oak Company* v. *Richard*, 5 Com. Cas. 100.

(3) 1 C.P., at p. 648.

(4) See also *Boone* v. *Eyre*, 1 H. Bl. 273, *n.*; *Ritchie* v. *Atkinson*, 10 East. 295, and *Davidson* v. *Gwynne*, 12 East. 381; *Freeman* v. *Taylor*, 8 Bing. 124; *The Alert*, 61 Fed. Rep. 504.

(5) (1903), 2 K.B. 740, at p. 749.

"You have first to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and, in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited" (1).

Where there is an express undertaking that ship shall arrive.

If there is an express undertaking that the ship shall arrive, the shipowner must perform it, or must pay damages for not performing it, unless the exceptions excuse him (2). For he "who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*" (3). But where the ordinary words are used, such as that the ship shall, with all convenient speed, or with all possible despatch, sail and proceed to the port of loading, and there load the cargo, the matter seems to be open to doubt. The question is one of construction, and does not appear to have been settled. But there are dicta to the effect that (subject to the exceptions) the owner does undertake to bring the vessel to the place of loading within a reasonable time, having regard to the adventure contemplated. Thus, in *Jackson* v. *Union Marine Insurance Company* (4), Bramwell, B., after holding that the ship must arrive in a reasonable time for the adventure in order to bind the charterer, added: "Now what is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it was not there, and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charterers would be discharged." And

(1) See also *Jackson* v. *Union Marine Insurance Company*, 10 C.P. 125. But *cf.* *Hudson* v. *Hill.*

(2) See *Barker* v. *M'Andrew*, 34 L.J. C.P. 191.

(3) Per Bowen, L.J., *Jacobs* v. *Crédit Lyonnais*, 12 Q.B.D. 603.

(4) 10 C.P. 125. *Cf.* per Cresswell, J., in *Hurst* v. *Usborne*, 25 L.J. C.P. 200, at p. 211.

again: "There is, then, a condition precedent that the vessel shall arrive in a reasonable time; on failure of this the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril" (1).

The decisions do not appear to be all reconcilable, and the judges do not seem to be quite unanimous as to what delay will excuse the charterer. In *Hudson* v. *Hill* (2) a ship had been chartered to proceed forthwith to Barbadoes, "being allowed to take in cargo of coals to a port outwards for owner's benefit, or to the Brazils, and, as ordered, load afloat a full and complete cargo of sugar or other lawful merchandise." The charter-party was dated 28th December 1870. The vessel took out a cargo of coals to Rio in Brazil, and proceeded thence to Barbadoes. Owing to adverse weather and other circumstances for which the owner was not responsible, she did not reach Barbadoes until 28th July. The season there for exporting sugar lasts from April to July, and on 28th July all the crop had been exported. The charterers' agents, therefore, refused to load the vessel, but offered to give her a cargo of sugar at St Vincent, 90 miles off. This the captain declined, unless he received an indemnity, which was not given. In an action against the charterers for not loading, the jury found that the delay did not put an end, in a commercial sense, to the commercial speculations entered upon by the shipowner and the charterer, and it was, therefore, held that the shipowner was entitled to judgment. Lord Esher, M.R. said (3): "When the delay is so long as to frustrate the mercantile adventure *as at first contemplated by both parties*, the original contract is determined and cannot be enforced. In the present case the mercantile adventure on the part of the charterers was to send a cargo of sugar from Barbadoes to England during the proper season, but the adventure on the part of the owners of the ship was that she should earn freight. The mere

What delay will excuse the charterer.

Where delay frustrates mercantile adventure.

(1) 10 C.P., at pp. 144, 145. But *cf.* *Taylor* v. *Caldwell*, 32 L.J. Q.B. 164; *Nickoll* v. *Ashton* (1901), 2 K.B. 126. See also *Cunningham* v. *Dunn*, 3 C.P.D. 443; per Martin, B., *Ford* v. *Cotesworth*, L.R. 5 Q.B., p. 548; per Lindley, L.J., in *Hick* v. *Rodocanachi* (1891), 2 Q.B., p. 638; *Taylor* v. *Great Northern Railway Company*, 1 C.P. 385.

(2) 43 L.J. C.P. 273.

(3) 43 L.J. C.P., at p. 279.

failure of the vessel to arrive in time to carry out the charterers' intention did not frustrate her owners' purpose in entering upon the contract of affreight. They were not bound to recognise the charterers' object. It was no part of the owners' intention that their ship should be loaded at a profit to the charterers, and therefore the contract remains in force, although no profit from putting a cargo on board can accrue to the charterers."

Cargo to be loaded in proper manner by shipowner.

In the absence of any provision in the charter-party showing a contrary intention, the shipowner must load the cargo in a proper manner (1).

Even if charterer may employ stevedores.

A provision in a charter-party that the charterers may employ stevedores and labourers to assist in the loading of the cargo does not show an intention that the shipowner shall not be liable if it is not loaded in a proper manner; at all events, if it is provided that such stevedores and labourers are to be under the control and direction of the master (2).

Not obligatory to appoint a stevedore.

A provision in a charter-party that the charterer and stevedore shall be employed by the ship does not render it obligatory on the charterer to appoint a stevedore. Therefore, if he does not appoint a stevedore, the shipowners are liable if the ship is loaded in such a manner that less cargo is carried than would have been if a stevedore had been employed (3).

Shipowner must put in ballast.

If the charter-party is silent as to ballast, it is an implied term that the shipowner shall put on board what ballast is required for the cargo loaded (4).

Shipowner may ship merchandise as ballast.

The shipowner may ship merchandise (*e.g.* ore) as ballast, receiving freight for it, provided it occupies no greater space than ordinary ballast would have done (5).

(1) *Blaikie* v. *Stembridge*, 6 C.B. N.S. 894, at p. 907; *Sack* v. *Ford*, 13 C.B. N.S., pp. 100, 102; *Sandemann* v. *Scurr*, L.R. 2 Q.B., at p. 98.

(2) *Sack* v. *Ford*, 13 C.B. N.S. 90.

(3) *Anglo-African Company* v. *Lamzed*, 1 C.P. 226. See also *Sandemann* v. *Scurr*, L.R. 2 Q.B., at p. 98.

(4) *Southampton Steam Colliery Company* v. *Clarke*, L.R. 6 Ex., at p. 57.

(5) *Towse* v. *Henderson*, 4 Ex. 890.

CHAPTER VII

EXCUSES FOR NON-PERFORMANCE OF CONTRACT

Void where contrary to English law.

WHERE the contract of affreightment cannot be performed without a violation of English law, it is void, whether the parties knew of the illegality or not when it was entered into (1). If it was illegal in the first instance, for example, as infringing the revenue or navigation (2) laws, or as trading with an enemy, it cannot be enforced by either party, even though he may have done his part (3). Such a charter-party is void and without legal effect.

Commerce wholly prohibited.

"If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unload his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage, although a different rule is laid down in this case by the French ordinance (4). But if war or hostilities break out between the place to which the ship or cargo belongs, and any other nation, to which they are not destined, although the performance of the

(1) *Esposito* v. *Bowden*, 7 E. & B. 762.
(2) *Cunard* v. *Hyde*, 29 L.J. Q.B. 6; *Blanck* v. *Solly*, 1 Moore 531.
(3) *Muller* v. *Gernon*, 3 Taunt. 394.
(4) Lev. 3, Sit. 3, Fret. art. 15. See Code de Com., art. 299.

contract is thereby rendered more hazardous, yet is not the contract itself dissolved, and each of the parties must submit to the extraordinary peril, unless they mutually agree to abandon the adventure" (1).

Government of country to which ship and cargo belong prohibiting exportation of particular commodities.

"So, if the government of the country, to which the ship and cargo belong, should prohibit the exportation of the particular commodities that composed the cargo, or by the terms of the contract are destined to compose it (as is sometimes done by all States with regard to provisions, in a time of scarcity), in this case also it seems that the law of the country would give no damages to the owner against a merchant who had been thus compelled by the law of the same country to abandon his engagement (2), but the contract would be dissolved on both sides. On the other hand, if a merchant hire a ship to go to a foreign port and covenant to furnish a lading there, a prohibition by the government of that country to export the intended articles neither dissolves the contract nor excuses a non-performance of it (3), for the laws of one nation do not give effect to the positive institutions of another inconsistent with its own, and the different interests of nations sometimes render an act meritorious in one which is prohibited by another in alliance with it, if the act be not contrary to the general law of nations, or to existing treaties, and the common exception of the restraint of princes and rulers applies only to the case of the master (4). But in such a case, or if the default be owing to the personal neglect or inability of the freighter, and not to any general cause, the master, upon his arrival at the port of loading, should obtain another cargo, if possible, from other persons, and not sullenly hoist sail and depart, in order to charge the merchant with the whole freight. And if upon the ship's arrival he is informed that the merchant is unable to furnish the lading, he cannot, by waiting the time appointed in the charter-party, charge the merchant with demurrage" (5).

(1) Abbott, 5th edit., p. 427. See also *Avery* v. *Bowden*, 26 L.J. Q.B. 3; *Reid* v. *Hoskens*, 26 L.J. Q.B. 5.

(2) By Lord Ellenborough in *Barker* v. *Hodgson* (1814), 3 M. and S. 267.

(3) *Blight* v. *Page*, 3 B. and P. 295, *n.* See *Sjoerds* v. *Luscombe*, 16 East. 201.

(4) *Blight* v. *Page*, *supra*; and see *Touteng* v. *Hubbard*, 3 B. and P. 298.

(5) Abbott, 5th edit., p. 428.

Illegality of foreign law.

Illegality by foreign law is treated by English law as impossibility in fact, and discharges the parties where it prevents something which they are both bound to do within a reasonable time, not otherwise defined (1), but not when it only prevents an act which one of them has agreed to perform within a fixed time (2).

"That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned that if, from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect without derogating from the clear public duty which a British subject owes to his Sovereign and the State of which he is a member, the non-performance of a contract in a State so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject" (3).

And in *Barker* v. *Hodgson* (4) Lord Ellenborough said: "If, indeed, the performance of this covenant had been rendered unlawful by the Government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had thus been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages."

Effect of declaration of war.

A state of war may exist *de facto* between two countries, although there has been no formal declaration of war by their governments; but there must be an actual commencement of hostilities (5). The effect of a declaration of war is to dissolve contracts of affreightment made before but which remain to be executed at the time (6). A declaration of war by this country against a foreign power

(1) *Ford* v. *Cotesworth*, L.R. 5 Q.B. 544; *Cargo ex Argos*, L.R. 5 P.C. 134.

(2) *Blight* v. *Page*, 3 B. and P. 295, *n.* See also *Kirk* v. *Gibbs*, 1 H. and N. 810.

(3) Per Lord Ellenborough in *Atkinson* v. *Ritchie*, 10 East. p. 534.

(4) 3 M. and S., p. 270. And see *Bailey* v. *De Crespigny*, L.R. 4 Q.B. 180; *Touteng* v. *Hubbard*, B. and P. 291.

(5) *The Teutonia*, 8 Moore P.C. (N.S.) 411.

(6) *Esposito* v. *Bowden*, 7 El. and Bl. 763.

imports a prohibition of commercial intercourse with the subjects of that power (1). The shipping of a cargo from an enemy's port, even in a neutral vessel, is an act of dealing and trading with the King's enemies, and is therefore illegal (2). The rule that war with the country where the cargo is to be loaded puts an end to the contract, applies when war has broken out between the country to which the ship belongs and that to which she is to go under the charter-party, though the charterer may be neutral. "This is not an unequal law, because, if war had broken out between the Czar and the King of the two Sicilies instead of Her Majesty, the vessel would, according to the principle stated above, have been absolved from going to Odessa, and might forthwith have proceeded upon another voyage" (3). Performance of the contract by the ship in such a case would be illegal according to the law of her own country.

Where a shipowner covenanted to proceed from L. to N. and there make a right and true delivery of the outward cargo, and having so done, receive on board a certain cargo, restraint of princes, etc., excepted; and the freighters covenanted, in consideration of the premises, that at N. they would find and provide a full and complete return cargo, and that £4750 should be paid on delivery of the outward cargo, which should be considered as earned for outward freight, it was held that, in an action against the freighters for not providing a return cargo at N., they could not plead in excuse of performance that the outward cargo was seized by the government at N. and never delivered to them, for the delivery of the outward cargo was not a condition precedent to the providing a return cargo, but the delivery of the outward cargo was a condition precedent to the payment of the £4750, and therefore a breach assigned for non-payment thereof was under these circumstances not sustainable (4).

In *The Teutonia* (5) Mellish, L.J., said: "It appears to their lordships, however, that when an English merchant ships goods on board a foreign ship, he cannot expect that

(1) *Barrick* v. *Buba*, 2 C.B. N.S. 563. (2) *Esposito* v. *Bowden*, *supra*.
(3) Per Willes, J., *Esposito* v. *Bowden*, 27 L.J. Q.B., p. 25.
(4) *Storer* v. *Gordon*, 3 M. and S. 308. (5) L.R. 4 P.C. 171, p. 180.

the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship." Thus where a Prussian vessel, carrying goods under charter, had been ordered to discharge at Dunkirk, and it became impossible for her to do so, because war broke out between France and Prussia, it was held by the Privy Council that the contract was not dissolved, as the charterer could name some safe port within the charter limits, not being French, at which the charter could be legally performed (1).

Where a contemplated mode of carrying out a contract is, without any intention of the parties thereto, illegal, the contract remains valid and enforceable, if the performance thereof in any other manner is legal and practicable; and in order to avoid a contract which can be legally performed, on the ground that there has been an intention to perform it in an illegal manner, it is necessary to show that there was a guilty intent to break the law (2).

Effect of blockade.

A charter, the performance of which requires the running of a foreign blockade, is not illegal by the municipal law of England, though both parties knew of the blockade when the charter was entered into (3). The only effect of such knowledge will be to prevent the delay caused by the blockade from putting an end to the charter (4).

Running a blockade, by international law, involves the confiscation of the ship if captured on the outward or homeward voyage, and of the cargo, if the owners knew

(1) *Cf.* per Lord Watson in *Dahl v. Nelson*, 6 A.C. 38, at p. 62; and per Lord Blackburn, at p. 53; Lord Mansfield in *Christy v. Row*, 1 Taunt. 300, p. 314.

(2) *Waugh* v. *Morris*, L.R. 8 Q.B. 208; *The Teutonia*, L.R. 4 P.C. 171; *Haines* v. *Busk* (1814), 1 Marshall 191; *Heslop* v. *Jones*, 2 Chit. 550. See also *Cunard* v. *Hyde*, 27 L.J. Q.B. 408; *Wilson* v. *Rankin*, L.R. 1 Q.B. 162; *Cunard* v. *Hyde*, 29 L.J. Q.B. 6; *Cargo ex Argos*, L.R. 5 P.C. 134.

(3) *The Helen*, L.R. 1 A. and E. 1; *Medeiros* v. *Hill*, 8 Bing. 231; *Moorsom* v. *Greaves*, 2 Camp. 626; *Naylor* v. *Taylor*, M. and M. 205.

(4) See *Chavasse, Ex parte*, 11 Jur. N.S. 400. The effect of the Foreign Enlistment Act 1870 must also be considered. See *United States* v. *Pelly*, 4 Com. Cas. 100.

or might have known of the blockade when they entered into the contract of carriage (1).

Contracts generally may be dissolved by mutual consent.

It is a general rule of law that, whatever derives its force and validity from the consent of parties, may, by the mutual consent of the same parties, be rendered null and invalid (2). But a merchant, who has laden goods, cannot insist on having them re-landed and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him (3). Indeed, a master who has signed bills of lading cannot with prudence deliver back the goods without having all the parts of the bill of lading delivered up to him; for if any one part has been transmitted to a third person, such third person may have acquired an interest in the goods.

Cancellation clause.

Charter-parties usually contain what is known as a "cancellation clause," which provides that, if the ship is not at the port of loading by a certain date, the charterers can cancel the charter-party. Lord Esher said in *Jameson* v. *Newcastle Steamship Freight Insurance Association* (4): "If there is no stipulation in a charter-party as to cancellation, how can either party cancel it? A charter-party can be cancelled only in the same way as any other contract. The rule is that neither party alone can cancel it, unless there is some stipulation to that effect. It can only be cancelled by mutual consent of both parties. It is well known, and it is admitted, that some charter-parties contain a cancellation clause by which both parties agree that, if the ship does not arrive at the loading berth before a certain day, the charterer can, as against the shipowner, cancel the charter-party. The word 'cancel' is used because both parties agree that it shall be done. In a business sense it means that, on a certain event, the charterer may cancel the charter-party, though the shipowner may not be willing. When there is such a clause, if there is a delay of the ship caused by a peril of the sea

(1) *The Mercurius*, 1 Rob. 80; *The Alexander*, 4 Rob. 93; *The Adonis*, 5 Rob. 256, 259; *The Exchange*, 1 Edw. 39, 42; *The James Cook*, 1 Edw. 261; *Baltazzi* v. *Ryder*, 12 Moore P.C. 168.

(2) See *Blasco* v. *Fletcher*, 32 L.J. C.P. 284.

(3) 2 Eq. Cas. Abr., p. 98, Anon.

(4) 7 Asp. M.C. 595.

or by any other cause, the charterer, on account of that delay, can cancel the charter-party if he pleases."

Lord Blackburn, in the course of his judgment in *Dahl* v. *Nelson* (1), pointed out that the circumstances which might be sufficient to dissolve executory contracts would not necessarily be sufficient to dissolve contracts which have been partly executed. His lordship quoted the words of Mr Justice Maule in *Moss* v. *Smith* (2), who said: "In matters of business a thing is said to be impossible where it is not practicable; and a thing is impracticable where it can only be done at an excessive or unreasonable cost." To which Lord Blackburn added (3): "And on this principle it was held in *Geipel* v. *Smith* (4) by the whole Court, and in *Jackson* v. *Union Marine Insurance Company* (5) by a majority in the Common Pleas, and in the same case in error (6) by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end. I said in *Geipel* v. *Smith* (7): 'Very different considerations arise where the cargo is already on board, or, as in *Hadley* v. *Clarke* (8), is already on the voyage; but while the contract still remains executory, I think time is so far of the essence of the contract as that matter which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it.' I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; he must do something with the cargo" (9).

Part of cargo destroyed after shipment.

A charter-party containing the usual clauses provided that the ship was, with all convenient speed, to proceed to P. and there load from the charterer's agents "a full and

(1) 6 A.C. 38, pp. 52, 53. (2) 9 C.B. 94, at p. 103. (3) 6 A.C., p. 52.
(4) L.R. 7 Q.B. 404. (5) 8 C.P. 572. (6) 10 C.P. 125.
(7) L.R. 7 Q.B., at p. 414. (8) 8 T.R. 259.
(9) See *Cunningham* v. *Dunn*, 3 C.P.D. 443; *Schilizzi* v. *Derry*, 24 L.J. Q.B. 193; the judgment of Lord Coleridge, C.J., in *Metcalfe* v. *Britannia Ironworks Company*, 2 Q.B.D., at p. 426; *Assicurazioni Generali* v. *The Bessie Morris Company*, 7 Asp. M.C. 217. See author's work on Demurrage, pp. 26, 27, 57.

complete cargo" of cotton. The ship proceeded to P., a part of the cargo was loaded, and another part was in a lighter alongside, ready to be loaded (the two together not amounting to a full cargo), when a fire occurred. The cargo on board was destroyed: that lying alongside was sent forward in another ship by the master. The ship was repaired, which took two months, and then tendered to the charterer's agents to load the rest of the cargo: but the agents refused to furnish any. It was held by Bramwell, B., that the defendant was bound to furnish so much cargo as would, with that already furnished, have made up a full and complete cargo (1).

Acts which will not excuse shipowner.

Therefore, a shipowner whose failure to deliver the goods is owing to any of the following causes (if these causes are not among the exceptions in the bill of lading), is not excused:—The forcible robbery by armed men of the goods carried (2); the destruction of the goods by fire (3); the vessel running against an anchor to which no buoy is fastened (4); a port being in a state of blockade (5); the confiscation by a foreign government of the goods as being contraband (6); the reasonable apprehension of capture by an enemy's ship (7); the prohibition by a foreign government of loading (8); the prohibition by the law of a British possession of such communication as is necessary for the purpose of loading (9); the fact (where a cargo of guano is to be loaded at a guano island) that there is no guano there to be loaded (10); the fact (where a cargo of coal is to be loaded) of the colliers at the collieries from which the coal is to be obtained being on strike, or delay caused in the delivery of the coals by a dispute between the railway company along whose line the coal is to be brought from

(1) *Jones* v. *Holme*, L.R. 2 Ex. 335.

(2) *Barclay* v. *Cuculla y Gana*, 3 Dougl. 389.

(3) *Forward* v. *Pittard*, 1 T.R. 27. This was the case of a carriage by land, but there is no distinction between a carrier by land and a carrier by water.

(4) *Trent and Mersey Navigation Company* v. *Wood*, 3 Esp. 127.

(5) *Medaros* v. *Hill*, 8 Bing. 231. (6) *Spence* v. *Chadwick*, 10 Q.B. 517.

(7) *The Patria*, L.R. 3 Ad. and E. 436. (8) *Sjoerds* v. *Luscombe*, 16 East. 201.

(9) *Barker* v. *Hodgson*, 3 M. and S. 267.

(10) *Hills* v. *Sughrue*, 15 M. and W. 253. Although in this case it was the shipowner, not the charterer, who relied as an excuse on the fact of there being no guano, yet, as the shipowner undertook to do what is usually done by the charterer, namely, provide the cargo, it is cited among the excuses for non-performance relied on by the charterer.

the collieries and the coal owners respecting the rates of carriage (1); the prevention of loading by ice, either in the port of loading (2), or on a canal by which the goods to be loaded are to be brought to the place of loading (3); the prevention of loading by rough weather (4), or the circumstance that the persons employed by the charterer to load have other vessels which have to take their turn of loading before the vessel chartered by the charterer (5), will not excuse a charterer whose failure to load within the proper time is owing to any of the above-mentioned causes if these causes are not among the exceptions in the charter-party.

If a person has by agreement agreed to do a certain thing, he is not excused if he does not do it, although prevented from doing it by the act of God (6). But if from the nature of the agreement it cannot reasonably be supposed that it was the intention of the parties that the agreement should be fulfilled unless some particular specified thing should continue to exist when the time for fulfilment arrived, it is an implied term of the agreement that fulfilment shall be excused if, before any breach of the agreement, fulfilment became impossible from that thing ceasing to exist (7).

(1) *Adams* v. *Royal Mail Steam Packet Company*, 5 C.B. N.S. 492. See author's work on Demurrage.
(2) *Barrett* v. *Dutton*, 4 Camp. 333.
(3) *Kearon* v. *Pearson*, 7 H. and N. 386.
(4) *Tkis* v. *Byers*, 1 Q.B.D. 244.
(5) *Ashcroft* v. *Crow Orchard Colliery Company*, L.R. 9 Q.B. 540.
(6) L.R. 1 Q.B., at 121.
(7) *Bailey* v. *De Crespigny*, L.R. 4 Q.B., at pp. 185, 186.

CHAPTER VIII

WHO ARE BOUND BY CHARTERS

Part-owner of shares in ship.

THE ship may belong to one owner or to several; and if to several, they may hold her in partnership or may have independent shares in her. When she belongs to partners, each of them is the agent of the other, and contracts made by one for her employment will be binding on all. But where there are several independent part-owners, they hold the ship as tenants in common, not as partners, though her earnings are treated on the footing of a partnership (1).

One part-owner cannot therefore generally, as such, bind the other owners by engaging to let the use of the ship to a particular person, or to employ her in a particular way (2).

Where part-owners disagree majority have right to control.

When the part-owners disagree as to the mode of employing the ship, those who own the majority of the shares have the right to control her. But they may be required to secure the minority against a possible loss of their interests in her. If the ship is in the possession of the minority, the majority may obtain possession by proceedings in the Admiralty Court, giving security to the minority if they object to the proposed voyage (3). On the other hand, if the majority have possession, the dissentient owners may, by an action of restraint, arrest the vessel until security has been given for the value of their shares, should she not return in safety (4).

The managing owner of a ship is the agent of each co-owner separately, and each co-owner may retract his

(1) *Green* v. *Briggs*, 17 L.J. Ch. 323; Maclachlan on Shipping, p. 95.

(2) *Brodie* v. *Howard*, 17 C.B. 109; *Fraser* v. *Cuthbertson*, 6 Q.B.D. 93.

(3) *The Valiant*, 1 W. Rob. 64; *The Elisabeth and Jane*, 1 W. Rob. 278; *The Kent*, Lush. 495.

(4) *The England*, 12 P.D. 32; *The Apollo*, 1 Hagg. 306; *The Margaret*, 2 Hagg. 275; *Blanshard, In re*, 2 B. and C. 244; *The Robert Dickinson*, 10 P.D. 15.

authority to the managing owner without consulting the other co-owners (1).

Dissenting part-owners not entitled to any part of freight.

Part-owners are not entitled to any part of the freight earned upon a voyage from the setting out of which they dissent; for, having obtained security for their shares, they cease to be interested in the voyage, and she sails at the risk and expense of the majority, although such dissenting part-owners are bound to pay their proportion of the repairs and outfit (2). A part-owner having a right to detain a ship must do so before she commences her voyage, if he is in a position to know that she is about to sail, and he cannot interfere on her putting into a port of refuge (3).

Parties who have mutually bound themselves will be restrained from doing any act inconsistent with the charter-party which they have entered into *bona fide*, and if they threaten to do so, the charterer may obtain an injunction (4). Where there is only an agreement for a charter-party, and the charter-party has not actually been completed, an injunction will not be granted (5). The charterer's remedy for a breach of the charter-party is by action for damages, either against the owners who made the contract, or *in rem* against the ship (6).

Part-owners who do not dissent from the employment of a ship, and are aware that the other part-owners have dissented, are liable to bear the expenses, and are entitled to recover the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part-owners (7).

Right and liabilities of purchaser.

A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, and of the vessel's outfit for it, and is entitled to a share of the freight (8).

(1) *The Vindobala*, 14 P.D. 50, per Esher, M.R.

(2) *Boson* v. *Sandford*, Carth. 58; *Davis* v. *Johnson*, 4 Sim. 539.

(3) *The Lady Clermont*, 23 L.T. 283; *The Maxima*, 39 L.T. 112; *The Talca*, 5 P.D. 169.

(4) *Sevin* v. *Deslandes*, 30 L.J. Ch. 457.

(5) *Haji Abdul Allarakki* v. *Haji Abdul Bacha*, I.L.R. 6 Bomb. 5.

(6) *De Mattos* v. *Gibson*, 28 L.J. Ch. 498.

(7) *The Vindobala*, 58 L.J. Adm. 51.

(8) *The Vindobala*, 58 L.J. Adm. 51. See also *The Meredith*, or *White* v. *Ditchfield*, 10 P.D. 69; *Messageries Imperiales Company* v. *Baines*, 7 L.T. 763; *Lumley* v. *Wagner*, 1 De G. M. and G. 618.

The purchaser of a ship takes a right to all accruing freight and profits from the moment of transfer of the ship to him, while the mortgagee only takes it from the time he enters into possession (1).

Mortgagors and mortgagees.

The Courts will look behind the register to the real character of transactions between co-owners, and treat as a mortgage that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties (2). This follows from the general principles of courts of equity, and from the express recognition of beneficial interests in sec. 57 of the Merchant Shipping Act 1894. So also the Courts will, between the parties, go behind a registered mortgage in the statutory form to see what were the real terms of the mortgage (3).

Where shares in a ship are mortgaged, possession being retained by the mortgagors, and the managing owner, duly appointed by all the co-owners, including the mortgagors, charters the ship for a foreign voyage, and she loads and is about to proceed on the voyage, the mortgagee, even though he takes possession of his shares before the sailing of the ship but after the making of the charter-party, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mortgage debt, provided the performance of the charter-party is not prejudicial to the security; and the Court will, upon the application of the co-owners, release a ship so arrested, and will condemn the mortgagee arresting in costs (4).

Mortgagee cannot arrest ship when about to sail.

It is settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and is subject to all liabilities of an owner from the moment of taking possession. Amongst those rights so accruing to him must be included the right to receive all freight accruing due after the possession is taken. The mortgagor, up to the time of such possession being taken, remains absolute owner, under

Position of mortgagee on taking possession.

(1) *Keith* v. *Burrows*, 2 A.C. 636.

(2) See *The Innisfallen*, L.R. 1 A. and E., at p. 76; *Ward* v. *Beck*, 13 C.B. N.S. 668; *Gardner* v. *Cazenove*, 1 H. and N., at p. 438.

(3) *The Cathcart*, L.R. 1 A. and E. 314. See ss. 31-46 The Merchant Shipping Act 1894, as to mortgage and sale of a ship.

(4) *The Maxima*, 4 Asp. M.C. 21. See also *The Keroula*, 11 P.D. 92; *Keith* v. *Burrows*, 2 A.C. 636; *De Mattos* v. *Gibson*, 28 L.J. Ch. 498; *Lumley* v. *Wagner*, 21 L.J. Ch. 898, per Westbury, L.J.; *Collins* v. *Lamport*, 34 L.J. Ch. 196; *The Fanchon*, 5 P.D. 173.

a legal title, for every purpose save this important exception, namely, except in so far as may be necessary for making such ship available as a security for the mortgage debt. He is, therefore, to that extent in a different position from the mortgagor of real property, who cannot bind his mortgagee by a lease (1).

A mortgagee of a ship, upon taking possession, becomes legally entitled to all freight which becomes due after taking such possession, in priority to mortgagees of the freight. Having such legal title, he is entitled, as against a mesne incumbrance of which he has no notice, to tack a subsequent incumbrance on the freight as between him and other mortgagees of the freight; any notice of this mesne incumbrance given to the charterers by the other mortgagees is immaterial (2).

(1) *Collins* v. *Lamport*, 34 L.J. Ch. 196.
(2) *Liverpool Marine Credit Company* v. *Wilson*, L.R. 7 Ch. 507.

CHAPTER IX

WHO MAY SUE AND BE SUED

Who may sue on contract of charter-party.

THE owner of a vessel cannot bring an action on a charter-party entered into by a broker on his behalf, but to which he was not made a party (1).

Who may be sued.

Where a vessel is put up as a general ship, and the shipper of goods on board of her has no knowledge that the vessel is under charter, the owner is the proper person to be sued in the event of the goods being damaged (2).

If a ship is chartered for a particular voyage, and put up as a general ship by the charterer, it is not enough, to make the owners liable for the non-delivery of goods, to show that they were put on board the ship to be carried on this voyage, unless it be proved that they were received on board by some person appointed or authorised by the owners (3).

If a person ships goods on board a vessel, knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods be injured by bad stowage.

If the shipper of goods was warned as to the way in which goods would be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage were bad (4).

In an action against the defendants, as owners of a ship, for not delivering goods shipped on board that vessel by the plaintiff, it turned out in evidence, however, that though the defendants were the owners of the ship, she had, in fact,

(1) *Gardner* v. *Lachlan*, 5 L. J. Ch. 332.
(2) *The Figlia Maggiore*, L.R. 2 A. and E. 106.
(3) *Mackenzie* v. *Rowe*, 2 Camp. 482.
(4) *Major* v. *White*, 7 C. and P. 41; *Hovill* v. *Stephenson*, 4 C. and P. 469.

been chartered for the voyage by them to two persons of the name of Reed and Parkinson. Upon this evidence, Lord Kenyon non-suited the plaintiff, holding: "As no express contract was proved with the defendants, that Reed and Parkinson were for that voyage to be deemed as the owners, and the captain as their agent *pro hac vice*, the liability being shifted by the charter-party from one party to the other" (1).

The owners of a ship by deed appointed A. to the command of the ship on a voyage from London to Calcutta and back. A. was to load the ship out and home, and to secure to the owners a certain amount of freight, retaining the surplus or making good the deficiency. An agent of the owners was to go on board to superintend the management of the stores, with power to displace A. and appoint another commander in case of his breaking the agreement on his part. It was held by the House of Lords that the deed released the owners from their liability, as such, to make good the loss upon goods sent from Calcutta to London by the ship, and lost or damaged on the voyage, and that A. alone was responsible to the shippers for such non-delivery, he being owner of the vessel *pro hac vice* (2).

Each part-owner liable for breach.

Each of the part-owners, for whom, and with whose authority, a contract for the ship's employment has been made, is liable in full for any breach of it. And he may be sued alone for the breach, subject to a right to apply to the Court to require the plaintiff to join the other owners who are liable on the contract as defendants (3).

An order must be applied for if it is desired to have the other part-owners joined; and such an order will generally be made (4). Where an action was brought against only one of two joint-contractors, the other being a foreigner, resident out of the jurisdiction, it was held by the Court of Appeal that the defendant was not entitled, as of right, under Order xvi., r. 11, to have the other joint-contractor added as a defendant. It would seem that Order xvi., r. 11, gives a discretion as to adding defendants; but, as a

(1) *James* v. *Jones*, 3 Esp. 27.
(2) *Newberry* v. *Colvin*, 1 Cl. and F. 283.
(3) R.S.C. 1883, xvi. 11, xvi. 9; *Pilley* v. *Robinson*, 20 Q.B.D. 155.
(4) *Kendall* v. *Hamilton*, 4 A.C. 504, at p. 516; *Pilley* v. *Robinson*, 20 Q.B.D. 155.

rule, such discretion ought to be exercised in accordance with the principles upon which, before the Judicature Act, a plea in abatement would have succeeded or failed (1). Where an action is brought against several joint-contractors, all of whom are within the jurisdiction, the action will not be stayed on the ground that one of the defendants has not been served, if the plaintiff has done everything in his power to effect service (2). Where judgment has been obtained against one part-owner, even although unsatisfied, yet no further action for the same matter can be brought against the other part-owners (3).

One part-owner may sue alone.

One part-owner may now sue alone on the contract (4). But the defendant may apply to the Court to require the other owners to be joined (5). As a rule, a plaintiff will not be added without the consent of the existing plaintiff (6); but where a person who is a necessary party as co-plaintiff, as, for instance, a co-contractee, is omitted, the defendant can apply to have the proceedings stayed until such person is joined as a party (7), or he may plead the objection in his defence (8), or get an order to have the point set down for argument as a point of law (9). The Court, however, has a discretion to refuse to stay proceedings until a co-contractee is joined (10). In *Dix* v. *G. W. Ry. Co.* (11), an order was made that persons whose presence the Court considered necessary should be added as co-plaintiffs if they consented, or as defendants if they did not consent. If a necessary party—as, for instance, a contractee—refuses to be joined as co-plaintiff, the proper course is to offer him an indemnity against costs if he will consent, and, if he still refuses, to join him as a co-defendant (12).

(1) *Wilson* v. *Balcarres Brook S.S. Company* (1893), 1 Q.B. 422. Formerly, a part-owner, sued alone upon a contract, might have pleaded the non-joinder of the other owners in abatement; see *Powell* v. *Layton*, 2 B. and P. N.R. 365; unless the action could be laid in tort; see *Govett* v. *Radnidge*, 3 East. 62; but now see R.S.C. xxi. 20.

(2) *Robinson* v. *Geisel* (1894), 2 Q.B. 685. (3) *Kendall* v. *Hamilton*, 4 A.C. 504.

(4) *Kendall* v. *Hamilton*, 4 A.C. 504, at p. 543. (5) R.S.C. 1883, xvi. 11.

(6) *Emden* v. *Carte*, 17 Ch. D. 169, 768.

(7) *Roberts* v. *Holland* (1893), 1 Q.B. 665; see Bullen and Leake's Pleadings, 6th edit., pp. 28, 29.

(8) *Cullen* v. *Knowles* (1898), 2 Q.B. 380. (9) *Roberts* v. *Holland*, *supra*.

(10) *Jackson* v. *Kruger*, 52 L.T. 962. (11) 55 L.J. Ch. 797.

(12) *Cullen* v. *Knowles* (1898), 2 Q.B. 380; *Bowden's Patent Syndicate* v. *Herbert Smith & Co.* (1904), 2 Ch. 86.

By rule 9 of R.S.C., 1883, xvi., however, one owner may sue on behalf of himself and the other owners. Where the plaintiff or defendant sues on behalf of himself and others under this rule, that fact should be stated in the title of the action, and not merely in the indorsement or statement of claim (1). The Court will not compel the plaintiff to add the persons on whose behalf he sues as co-plaintiffs (2) where the only object is to secure their liability for costs. Nor will the plaintiff be compelled to give the names and addresses of the other persons on whose behalf he sues (3). If one of the persons on whose behalf the plaintiff purports to sue objects to the plaintiff so doing, he may apply by summons to have himself added as a defendant (4), but the application must be made promptly (5).

One owner may sue on behalf of himself and other owners.

(1) *In re Tottenham* (1896), 1 Ch. 628, explaining *Eyre* v. *Cox*, 24 W.R. 317; *Worraker* v. *Pryer*, 2 Ch. D. 109.
(2) *De Hart* v. *Stephenson*, 45 L.J. Q.B. 575.
(3) *Leathley* v. *M'Andrew*, W.R. (1875), 259.
(4) *Wilson* v. *Church*, 9 Ch. D. 552; *Watson* v. *Cave*, 17 Ch. D. 19.
(5) *Conybeare* v. *Lewis*, 48 L.T. 527.

CHAPTER X

DAMAGES FOR NON-PERFORMANCE

DAMAGES for breach of a charter-party are assessed upon the same principles as damages for breach of other contracts.

Principle by which juries ought to be guided in assessing damages.

The principle by which juries ought to be guided in estimating the damages arising out of any breach of contract were laid down in *Hadley* v. *Baxendale* (1), where the Court said: "We think the proper rule is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases

(1) 23 L.J. Ex. 179.

not affected by any special circumstances from such breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

In that case a miller had employed a carrier to convey a broken shaft belonging to his mill, to be delivered to an engineer, and the carrier was guilty of an unreasonable delay in delivering it, and the engineer was thereby prevented from making a new shaft from the model of the old one, and the mill remained idle for a considerable time. It was held, in an action against the carrier for delay, that the jury, in estimating the damages, were not justified in taking into their consideration the loss of profits by reason of the stoppage of the mill. "For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendant" (1).

Examples.

In an action against the defendants for breach of contract in improperly repairing a sea-going steam vessel, the plaintiffs claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs. It was held, on the authority of *Hadley* v. *Baxendale* (2), that they were entitled to do so, the detention of the vessel being the probable result of the breach of contract (3).

The plaintiffs, a firm of stevedores, contracted to discharge a cargo from the defendant's ship, the defendant agreeing to supply all necessary cranes, chains, and other gearing reasonably fit for that purpose. The defendant, in breach of his agreement, supplied a defective chain, which broke while being used, and in consequence one of the

(1) 23 L.J. Ex., p. 183. See also *Smith* v. *Green*, 1 C.P.D. 92; *Wilson* v. *Newport Dock Company*, L.R. 1 Ex. 177, p. 184; *Cory* v. *Thames Ironworks Company*, L.R. 3 Q.B. 181, p. 190; *Wilson* v. *Dunville*, 6 L.R. Ir. 210; *Bostock* v. *Nicholson* (1904), 1 K.B. 725.

(2) 23 L.J. Ex. 179.

(3) 47 L.J. Q.B. 239.

plaintiffs' workmen was injured. The plaintiffs might have discovered the defect in the chain by the exercise of reasonable care. The workman brought an action for compensation under the Employers' Liability Act 1880 against the plaintiffs, who settled the action by paying the workman £125, which sum they sought to recover from the defendant as damages for his breach of contract. It was not disputed that the settlement of the action brought by the workman was a proper one. The Court of Appeal held that the plaintiffs' liability to pay compensation to their workman was the natural consequence of the defendant's breach of contract, and such as might reasonably be supposed to have been within the contemplation of the parties when the contract was entered into, and therefore the damages claimed were not too remote (1).

The plaintiff chartered a ship from the defendants for a single voyage. By the charter-party the defendants warranted that the vessel was "in every way fitted for the voyage and service, and to be so maintained by the owners." During the currency of the charter-party a stevedore engaged on the ship in the work of unloading sustained injuries by reason of the defective condition of an iron ladder leading to the hold. The stevedore sued the charterer for damages. The charterer defended the action, and in so doing acted reasonably, and judgment was given against him for damages and costs on the ground that he had committed a breach of duty towards the stevedore in not making an inspection of the vessel before inviting the stevedore on board. It was held by Bigham, J., that the charterer's liability to the stevedore was the natural consequence of the defendants' breach of warranty, and that the charterer was entitled to recover from the defendants the damages and costs paid by him to the stevedore, and his own costs, as between solicitor and client, incurred in defending the action (2).

But in *British Columbia Sawmill Company* v. *Nettleship* (3), the plaintiffs delivered to the defendant's servants, on a quay at Glasgow, for shipment on board the defend-

(1) *Mowbray* v. *Merryweather* (1895), 2 Q.B. 640. See also *The City of Lincoln*, 15 P.D. 15; *The Marpessa* (1891), P. 403; *The Port Victoria* (1902), P. 25.
(2) *Scott* v. *Foley*, 5 Com. Cas. 53. (3) 3 C.P. 499.

ant's vessel, which lay alongside, several cases containing machinery, which was intended for the erection of a saw-mill at Vancouver's Island. The master gave a bill of lading for them, describing the case as containing "merchandise." The defendant knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained machinery without which the mill could not be erected, could not be found on board, and the plaintiffs were obliged to send to England to replace the lost articles. It was held that the defendant was liable for the loss of the machinery, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board. It was further held that the plaintiffs could only recover the cost of replacing the lost parts, including freight to Vancouver Island, with interest at 5 per cent. upon the amount by way of compensation for the delay. It was considered that the master could not be supposed to know that the whole machinery would be useless without the parts that were lost, or that those parts could only be replaced in England (1).

On a contract to sell cotton of a certain quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for the delivery; but the vendor is not generally liable for a further loss of profits which would have been made by the purchaser upon a re-sale, even though it may be shown that the object of the purchaser was to sell again, and that the vendor knew it (2).

The plaintiff must not make the loss worse.

Fitzgerald, B., in *Irvine* v. *Mid. and G. W. Ry. Co.* (3), said: "In applying this general intention of placing the complainant in the same position as he would have

(1) *Cf. Baldwin* v. *L. C. and D. Ry. Co.*, 7 Q.B.D. 582; *Sanders* v. *Stuart*, 1 C.P.D. 326; *Skinner* v. *City of London Mar. Ins. Corp.*, 14 Q.B.D. 882; *Gee* v. *Lancashire and Yorks. Ry. Co.*, 30 L.J. Ex., pp. 11, 15; *Hales* v. *L. and N. W. Ry. Co.*, 32 L.J. Q.B. 292; *Woodger* v. *G. W. Ry. Co.*, 2 C.P. 318; *Watson* v. *Gray*, 16 T.L.R. 308; *Portman* v. *Middleton*, 27 L.J. C.P. 231; *Elbinger Actiengesellschaft* v. *Armstrong*, L.R. 9 Q.B. 473; *Wilson* v. *General Iron Screw Collier Company*, 47 L.J. Q.B. 239.

(2) *Williams* v. *Reynolds*, 34 L.J. Q.B. 21; *Thol* v. *Henderson*, 8 Q.B.D. 457. But see per Lord Esher, *Grébert-Borgnis* v. *Nugent*, 15 Q.B.D. 85, at p. 89; *Borries* v. *Hutchinson*, 34 L.J. C.P. 169; *France* v. *Gaudet*, L.R. 6 Q.B. 199; *Duff* v. *Iron, etc., Co.*, 19 Ct. of Sess. Cas. (4th ser.) 199; *Hinde* v. *Liddell*, L.R. 10 Q.B. 265.

(3) 6 L.R. Ir. 55, at pp. 53, 65.

been in if the contract had been performed to a case like the present, we must remember that the altered position to be redressed must be one directly resulting from the breach, and not from any act or omission of the complainant subsequent to the breach, and not directly attributable to it. It is not sufficient that it be an act or omission which would not, in fact, have taken place but for the breach. . . ." "The law never contemplates it being reasonable for him to create a loss for himself because the contract has been broken."

As regards shipowner.

Thus if the whole agreed period for loading has expired, and no cargo has been provided, or if before any demurrage has been incurred there has been a definite refusal by the charterer to supply a cargo, and the shipowner still chooses to keep the ship at the port, he will do so at his own risk, and will not be entitled to additional damages for the subsequent detention (1). Nor can damages be claimed for detention of a ship for harbour dues payable by the consignee, the master having delayed to pay them; his duty is to pay them, without delay, and recover them from the consignee (2).

As regards charterer.

If the shipowner does not provide a ship as agreed, the charterer may generally procure another ship, and may claim the consequent increase of costs as damages from the shipowner. But he must act reasonably (3).

Examples of breaches of contract to load.

In *Featherstone* v. *Wilkinson* (4) B. contracted to supply A. with a ship to load coals in the second week of January at a Newcastle colliery where the rule (known to both) was that no coal was supplied to a shipper until he had chartered and inscribed her name in the colliery books. B. failed to supply the ship. A. chartered another ship, but by reason of B.'s breach of contract, and the above rule, was unable to get coal until the third week of January. Coal at Newcastle having risen 1s. 6d. per ton, A. had to pay on his coal £97 10s. more than he would have had to pay had B. fulfilled the contract. A. took the

(1) *Blight* v. *Page*, 3 B. and P. 295, *n.*; *Dimech* v. *Corlett*, 12 Moo. P.C. 199; *Hick* v. *Tweedy*, 63 L.T. 765.

(2) *Moller* v. *Jenks*, 19 C.B. N.S. 332. See also *Davis* v. *L. and N. W. Ry. Co.*, 32 L.T. 148; *Mors le Blanch* v. *Wilson*, 8 C.P. 227.

(3) See *Le Blanche* v. *L. and N. W. Ry. Co.*, 1 C.P.D. 286.

(4) L.R. 8 Ex. 122. See also *Welch* v. *Anderson*, 7 Asp. M.C. 177.

coals to Havre, but no evidence was furnished of A.'s subsequent dealing with the coal or of the price of coal at Havre. It was held (*a*) that the fact of A. being obliged to pay the extra £97 10s. was *prima facie* and also conclusive evidence that he was the loser of £97 10s., and that the loss was the direct and immediate result of B.'s breach of contract; (*b*) that to reduce the damages it was incumbent on B. to prove, if possible, that A., in his subsequent dealing with the coal, had recouped his original loss.

In *Jones* v. *Adamson* (1) the defendant chartered the plaintiff's ship upon the terms that she should go to a foreign port for a cargo, and "there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but owing to the defendant's default was not ready when her turn came, and was consequently detained eleven days. When her turn came round again she was ready, but the wind coming on to blow, and the harbour being crowded, the harbour-master refused to allow the ship to go up to load, and she was consequently detained three days. The plaintiff having sued on the charter-party claiming damages for the detention, it was held that the detention for the three days was the legal and natural consequence of the defendant's default in not having the ship ready for the first turn, and that the plaintiff was entitled to damages in respect of the three days as well as the eleven days (2).

A ship's husband covenanted that his ship should at one port take in a quantity of brandy and convey it to another port, and there receive a cargo of fruit, etc., which the freighters of the ship covenanted to supply. He did not take the brandy, and the freighters did not furnish a full homeward cargo, for which he recovered damages against them. They afterwards brought an action against his widow and representative to recover damages for the breach of his covenant. It was held that they could not recover in any shape, in that action, either the damages they had paid him, or the costs they had incurred in defending the former action, although they were prevented from obtaining

(1) 1 Ex. D. 60.

(2) See also *The Tyne and Blyth Shipping Company* v. *Leech* (1900), 2 Q.B. 12.

the homeward cargo by the neglect of the ship's husband in not taking in the brandy (1).

Plaintiff must try to minimise the loss.

If a charterer fails to load a ship, the master is bound to do what is reasonable to minimise the loss. And expenses or losses prudently incurred in mitigating the ultimate loss, will be allowed as part of the damage. And the same rule applies to the charterer where the shipowner fails to carry out his contract (2).

Although *prima facie* the plaintiff may be entitled to the full measure of damages, yet, where the actual amount of damage has been in any degree affected by the conduct of the plaintiff or his agents, that is a legitimate element of consideration, and the jury are at liberty to diminish the damages on that account. But if they do so unreasonably and arbitrarily, the Court can grant a new trial, as for a verdict against evidence (3).

In *Wilson* v. *Hicks* (4), which was a case of a breach of contract to supply cargo, it appeared that the freighters offered the captain his choice of three other ports, they guaranteeing him a good cargo, and all extra charges. The captain refused to go anywhere else, but waited at the contract port till the proper time had elapsed, and then sued for full damages, which amounted to £2750. The judge told the jury that the captain was bound to do what was reasonable under the circumstances, and that they were at liberty to reduce the damages if they thought that he had acted unreasonably.

It has been decided that where the breach of contract arises from a definite fact, which renders the performance of the contract by the defendant impossible, the plaintiff is bound to take the earliest opportunity, after receiving notice of that fact, to mitigate his loss.

For instance, where a vessel which was to take cargo on board for delivery during January, was stranded before it reached the port of shipment, it was held that the intended

(1) *Walton* v. *Fothergill*, 7 C. and P. 392.

(2) *Wilson* v. *Hicks*, 26 L.J. Ex. 242; *Harries* v. *Edmonds*, 1 C. and K. 686; *The Blenheim*, 10 P.D. 167. See also *Smith* v. *M'Guire*, 27 L.J. Ex. 465, p. 272; *Roth* v. *Taysen*, 1 Com. Cas. 306; *Tindall* v. *Bell*, 11 M. and W. 228; *The Columbus*, 3 W. Rob. 158; *The Empress Eugénie*, Lush. 138; *The Marpessa* (1891), P. 403; *The Minnentonka* (1904), P. 202.

(3) *Wilson* v. *Hicks*, 26 L.J. Ex. 242. (4) 26 L.J. Ex. 242.

consignee was not entitled to watch a rising market during the whole of January, but was bound to act as ordinary men of business would act, and to mitigate the loss by determining the liability at the earliest date at which he could obtain another cargo (1).

But in *Hudson* v. *Hill* (2), where the charterer's agents refused to load the vessel and denied liability, it was held that the master was not obliged to treat the refusal as a breach, and at once seek other employment; and also that he was not unreasonable in refusing to take a cargo from them upon terms which might have exonerated the charterer from liability upon the charter-party.

In *Dimech* v. *Corlett* (3) it was held that the master was not bound to accept another charter-party, which was offered by other persons, before the agreed days on demurrage had expired, for he was still bound to be ready for cargo under the original charter-party, which had not been repudiated.

By a charter-party it was stipulated that a ship should proceed to Limerick with her then present cargo and there take a cargo of oats for London, at a freight of 2s. 8d. per quarter, six days being allowed for loading at Limerick. Before the expiration of the six days the freighter's agent offered the captain a cargo at 2s. 6d., and said that the freighter's broker would pay the difference. The captain refused to take anything not according to the terms of the charter-party. It was held that, as the contract had not then been broken by the defendant, the captain was not bound to accept this offer; but that, if the contract had been broken by the freighter not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible (4).

This is supported by a dictum of Bramwell, B., in *Bradford* v. *Williams* (5): "The captain would clearly be bound to find some occupation for his ship; otherwise, when

(1) *Nicholl and Knight* v. *Ashton* (1900), 2 Q.B. 298; following *Roth* v. *Taysen*, 1 Com. Cas. 306; affirmed (1901), 2 K.B. 126.
(2) 43 L.J. C.P. 273.
(3) 12 Moo. P.C. 189.
(4) *Harries* v. *Edmonds*, 1 C. and K. 686.
(5) L.R. 7 Ex., at p. 262.

he brought his action, the charterer would have good cause to complain." In *Frost* v. *Knight* (1) Cockburn, C.J., said: "In assessing the damage for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished."

On the other hand, in *Smith* v. *M'Guire* (2), Martin, B., doubted "whether a party who breaks a contract has a right to say to the other party: 'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me of it.' I am not prepared to say that a ship-owner, who has lost his freight by reason of a breach of contract by the charterer, is bound to go and look for employment for his ship, so as to relieve the charterer from the consequences."

In *Brown* v. *Muller* (3) the plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November 1871. In August 1871 the defendant gave notice to the plaintiff that he did not intend to deliver any iron. In December the plaintiff commenced an action for non-delivery, and claimed as damages the difference on the 3rd of November between the contract and market prices of the iron. It was held that the proper measure of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th September, the 31st October, and the 3rd November respectively.

Damages for withdrawal of ship.

A charter-party contained a clause providing, "Payment of the said hire to be made in cash monthly in advance . . . and in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the charterers." A month's hire became due on 11th September. On 1st October it was still unpaid, and the owners gave notice that they withdrew the ship, which was at that time at sea. On 2nd October the month's hire was paid, and on the same day the ship arrived in port. On 4th October the

(1) L.R. 7 Ex. 111, at p. 115. (2) 3 H. and N. 554, at p. 567.
(3) L.R. 7 Ex. 319.

master, under instructions from the owners, withdrew the ship. It was held by the Privy Council that there was a breach of the charter-party, for which the owners were liable in damages (1).

Consequential damages.

The charterers of a ship took on board for freight sugar and other perishable goods, the property of various parties. The ship being unseaworthy, the sugars were damaged, and actions were brought against the charterers by the owners of the sugars and damages were recovered, the owners of the ship having notice of such actions. In an action by the charterers against the owners for the unseaworthiness and want of repair of the ship, it was held that they were entitled to recover the damages and costs paid in such actions (2).

Personal negligence of shipowner.

The owner of a chartered ship, in herself seaworthy, but rendered unseaworthy by the improper loading of cargo and ballast which is carried out under his orders, is liable for damage occasioned by his personal negligence (3).

Charterer engaging larger ship.

In an action against a broker who had professed, on behalf of the owner of a ship, to charter her to the plaintiffs, not having authority so to do, and who had requested them to charter themselves some other ship, and they having chartered a much larger ship at a higher freight, it was held that they could not recover from the broker more than the difference of freight on the tonnage of the former ship, if they could have procured one of similar size, or had neglected to give the broker notice of the substituted ship, so that he might use the surplus freight (4).

Shipowner must seek another cargo where charterer fails to load.

Where the charterer fails to send the agreed cargo, the shipowner, on receiving notice that it will not be sent, must take reasonable steps to obtain another cargo (5). On the refusal of the charterer to load the agreed cargo, the master should do what he can to get another cargo, at as good a freight as possible, so as to avoid sailing empty (6).

(1) *Langford Steamship Owners* v. *Canadian Forwarding Company*, 96 L.T. 559.
(2) *Blyth* v. *Smith*, 12 L.J. P.C. 203.
(3) *City of Lincoln* v. *Smith* (1904), A.C. 250.
(4) *Mitchell* v. *Kahl*, 2 F. and F. 709. See also *Hinde* v. *Liddell*, L.R. 18 Q.B. 265; *Irvine* v. *Midland G. W. Ry. Co.*, 6 L.R. Ir. 55; *O'Connor* v. *Foster*, 10 Watts 418 (U.S.), cited Sedgwich, *Damages*, ii., 102; *Waller* v. *Midland G. W. Ry. Co.*, 4 L.R. Ir. 376; *Mourse* v. *Snow*, 6 Greenl. 208, cited Angell, Carr. s. 485.
(5) See *The Argentino*, 14 A.C. 519; *Aitken* v. *Ernsthausen* (1894), 1 Q.B. 773.
(6) *Wilson* v. *Hicks*, 26 L.J. Ex. 242; *Pearson* v. *Goschen*, 33 L.J. C.P. 265.

No deduction of freight for loss of part of cargo.

A shipowner is entitled to be paid a lump freight, without any deduction for a loss of part of the cargo occurring during the voyage.

By a charter-party, the ship was to be loaded with a full cargo, and to have a deck cargo, and being so loaded, was to proceed to London and "deliver the same, on being paid freight, as follows: a lump sum of £315 . . . the freight to be paid in cash, half on arrival and remainder on unloading and right delivery of the cargo." The ship arrived in London with the whole of the cargo with which the charterer had loaded her, with the exception of a deck load, which had been lost during the voyage by one of the excepted perils in the charter-party, and without any default on the part of the master or crew. It was held that the shipowner was entitled to the whole of the lump freight without deducting the proportion of freight payable in respect of the deck load which had been lost (1).

Consignee has no right to deduct freight for lost goods.

Where part of the goods mentioned in a bill of lading are missing upon the ship's arrival at its port of destination, the consignee has no right to set off against the freight, or to deduct from the sum due for the freight of the goods delivered, the value of the missing articles (2). He must seek his remedy for that value, as distinct from their freight, by cross-action.

Where charterer does not covenant to furnish full cargo.

If an entire ship be hired, and the burden thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, etc., of goods which he shall lade on board, but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped (3).

Substituted adventure.

The defendants chartered a vessel to New Zealand, there to load a cargo, or to give notice by an agent there of their determination not to load, in which event they were to pay the plaintiff £500. The vessel arriving at New Zealand found no cargo ready, nor had the defendants any agent there, whereupon the master proceeded to Batavia to obtain a freight. The voyage home by the

(1) *Robinson* v. *Knights*, 42 L.J. C.P. 211. See author's work on Freight, pp. 70, 158.

(2) *Meyer* v. *Dresser*, 10 L.T. 612; *Dakin* v. *Oxley*, 10 L.T. 268; *The Salacia*, 32 L.J. Ad. 43.

(3) *Lady James* v. *East India Company*, Abbott, 5th edit., 279.

way of Batavia, though circuitous, in the event turned out to be more profitable to the owner than would have been the voyage originally contemplated. It was held that, under the circumstances, the plaintiff was not entitled to recover the penalty of £500 in addition to the increased profit upon the homeward voyage (1).

Benefit accruing from breach cannot be taken in mitigation.

When a breach of contract has been committed with the owner of a ship whereby he is prevented from employing her upon an adventure, the damages payable to him cannot be reduced on the ground that he has earned a profit by sending another ship upon the same adventure in place of the first-mentioned ship. In an action by several plaintiffs for breach of contract, the damages payable to them cannot be reduced upon the ground that individual plaintiffs have derived a profit from the breach (2).

Damages for delay in delivering.

The measure of damages for delay in delivering a cargo of merchandise for which the vessel is liable, is the difference between the price the goods actually brought when they arrived and the price they would have brought at the time they should have been delivered; and this measure of damages is not changed by a stipulation in the bill of lading that the shipowner is not to be liable in any case for more than the invoiced or declared value of the goods, the purpose of which is only to fix the outside limit of liability (3).

Penalties in charters.

Where the charter-party contains a penalty, which is not liquidated damages, a larger sum than the penalty may be obtained by suing, not for it, but for damages for the breach of contract (4). Lord Mansfield, in *Lowe* v. *Peers* (5), said: "There is a difference between covenants in general and covenants secured by a penalty or for-

(1) *Staniforth* v. *Lyall*, 9 L.J. (O.S.) C.P. 23. See also *Puller* v. *Staniforth*, 11 East. 232; *Bell v. Puller*, 2 Taunt, 285.

(2) *Jebsen* v. *East and West India Dock Company*, 19 C.P. 300. See also *The City of Peking*, 15 A.C. 438. See author's work on Demurrage, p. 73; *The Mediana* (1900), A.C. 113. See also *Aitken* v. *Ernsthausen* (1894), 1 Q.B. 773, and *Weir* v *Girvin* (1900), 1 Q.B. 45, referred to in author's work on Freight, pp. 10, 122.

(3) *The Syria*, 101 Fed. Rep. 728. See also *Hart* v. *Pennsylvania Railway Company*, 112 U.S. 331; *Metropolitan Trust Company* v. *Toledo, etc., Company*, 107 Fed. Rep. 628, referred to in the author's work on Bills of Lading.

(4) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East. 343.

(5) 4 Burr. 2228.

feiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover it (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole), or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*." Where the plaintiff sues in form for the penalty, the jury cannot go beyond it; but within it they may give him any compensation to which he can prove himself entitled (1). On the other hand, where a charter-party was secured by a penalty, it was ruled that, upon breach, the plaintiff had his choice either to receive the penalty and rescind the contract, or to bring an action upon the contract and let the covenant stand, and so obtain greater damages than the penalty (2).

Penalty or liquidated damages is a question of law.

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages, is a question of law to be decided by the judge upon a consideration of the whole instrument (3); and the principle upon which he is to proceed, is simply to ascertain the real intention of the parties from the language they have used.

A sum stated to be a penalty is *prima facie* so.

Where the sum is expressly stated to be a penalty, and there are no other words or circumstances altering, controlling, or affecting this statement, the sum cannot be considered as liquidated damages (4). On a guarantee that a vessel in which the plaintiff had shipped goods should sail before any other vessel then in berth, "under penalty of forfeiting one-half of the freight," it was held that one-half of the freight could be recovered as liquidated damages without evidence of actual damage (5).

Use of the words "liquidated damages" not conclusive.

On the other hand, the mere use of the words "liquidated damages" is not decisive against the sum being held to be a penalty. The principle is, that although the parties may have used the term "liquidated damages," yet, if the

(1) *Wilbeam* v. *Ashton*, 1 Camp. 78; *Wilde* v. *Clarkson*, 6 T.R. 303.
(2) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East. 433; *Maylam* v. *Norris*, 2 D. and L. 829.
(3) *Sainter* v. *Ferguson*, 7 C.B. 727.
(4) *Smith* v. *Dickenson*, 3 B. and B. 630; *Slowman* v. *Walter*, 1 Bro. C.C. 418.
(5) *Sparrow* v. *Paris*, 7 H. and N. 594.

Court can see upon the whole of the instrument taken together that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty (1).

In *Kemble* v. *Farren* (2) the Court held a sum to be a penalty which had been described by the parties themselves as "liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof."

In cases of doubt, inclination in favour of penalty.

Where it is doubtful from the terms of the contract whether the parties meant that the sum should be a penalty or liquidated damages, the inclination of the Court will be to view it as a penalty (3). But the mere largeness of the amount fixed will not, *per se*, be sufficient reason for holding it to be so (4).

Test as to whether penalty or liquidated damages.

In considering whether a stipulation to pay a sum of money on breach of condition is to be treated as a penalty or as liquidated damages, the test appears to be, whether the loss which will accrue to the plaintiff from an infringement of the contract can, or can not, be accurately or reasonably calculated in money antecedently to the breach. If it can be so calculated, then the fixing of a larger sum of money will be treated as a penalty. Where the loss is absolutely uncertain, it will be treated as liquidated damages (5).

(1) Per Parke, B., *Green* v. *Price*, 13 M. and W. 701; affirmed 16 M. and W. 346. The use of the expression "penalty" or "liquidated damages" signifies nothing, the real intention of the parties having to be ascertained. See *Sparrow* v. *Paris*, 7 H. and N. 594; per Bramwell, B., *Betts* v. *Burch*, 4 H. and N., at p. 510; *Dimech* v. *Corlett*, 12 Moo. P.C. 299.

(2) 6 Bing. 141.

(3) *Barton* v. *Glover*, Holt N.P.C. 43; *Crisdee* v. *Bolton*, 3 C. and P. 243.

(4) Per Lord Eldon, *Astley* v. *Weldon*, 2 B. and P. 351; and per Lord Romilly, *Herbert* v. *Salisbury and Yeovil Railway Company*, L.R. 2 Eq. 224.

(5) Mayne on Damages.

CHAPTER XI

EXCEPTED PERILS

CHARTER-PARTIES contain an undertaking by the shipowner and charterer to perform their respective parts of the contract, unless prevented by certain perils excepted in the contract, provided that such perils could not have been avoided by reasonable care and diligence on the part of the person prevented from performing the contract, and of his servants. The excepted perils protect the charterer as well as the shipowner. Thus under a charter to load guano with an exception of perils of the sea, the charterer was prevented from loading by a storm which destroyed the loading pier; it was held he was protected by the exception (10). But the exceptions do not affect the relations of shipowner and charterer outside the contract, as in damage by the ship to charterer's property (11). For the consequences resulting solely from the occurrence of these perils, the shipowner or charterer under a charter-party, the shipowner or carrier under a bill of lading, are not liable. In considering whether the breach complained of is caused by an excepted peril, the immediate and not the remote cause is looked to (12).

Excepted perils.

The exceptions are very numerous, both in charter-parties and bills of lading, but the following have come before the Courts for interpretation, and will be found explained

(1) *Barrie* v. *Peruvian Corporation*, 2 Com. Cas. 50. This case was followed, but doubted, by Bigham, J., in *Re Newman and Dale* (1903), 1 K.B. 262.

(2) *Raynes* v. *Ballantyne*, 14 T.L.R. 2.

(3) *The Xantho*, 12 A.C. 503; *Hamilton* v. *Pandorf*, 12 A.C. 518; *Letricheux* v. *Dunlop* (1891), 19 Sc. Sess. Cas. 209; *Smith* v. *Rosario Company* (1893), 2 Q.B., at p. 328.

either under "Definitions" in the present work or in the author's work on Bills of Lading.

(1) Act of God.
(2) King's enemies.
(3) Inherent vice of cargo.
} Implied exceptions in a contract of carriage.

(4) Accident (1).

(5) Barratry of master and crew (2).

(6) Breakage (3).

(7) Pirates, robbers, thieves, whether on board or not; pilferage.

(8) Arrest and restraints of princes, rulers, and peoples (4).

(9) Strikes, lockouts, or stoppages of labour from whatever cause.

(10) Leakage, ullage, spiles, jettison.

(11) Liberty to call at any ports in any order.

(12) Colliery guarantee.

(13) Collision.

(14) Contents unknown.

(15) Damage capable of being covered by insurance.

(16) Dangers of the seas. *See* "Perils of the Seas," "Accidents," "Navigation."

(17) Deck cargo at merchant's risk. *See* "At Merchant's Risk."

(18) Fire or any of the consequences thereof.

(19) Risk of craft.

(20) Risk of storage afloat or on shore, save risk of boats so far as ships are liable.

(21) Injurious effects of other goods (covers wilful default and misfeasance by shipowner's servants, *Taulman* v. *Pacific S.S. Company*, 26 L.T. 704).

(22) Perils of boilers, steam, or steam machinery (5).

(23) Goods to be forwarded at ship's expense, but owner's risk (6).

(1) The *Torbryan* (1903), P. 194; *Fenwick* v. *Schmalz*, 3 C.P. 313.

(2) See *Vallejo* v. *Wheeler*, 1 Cowp. 143, 154.

(3) *Phillips* v. *Clark*, 26 L.J. C.P. 168; *Moes* v. *Leith and Amsterdam Steamboat Company* (1867), 5 Ct. of Sess. Cas. (3rd ser.) p. 988.

(4) *Aktieselskabet Lina* v. *Turnbull* (1907), Ct. of Sess. Cas. 507.

(5) Does not apply if the defect was due to negligence. *Siordet* v. *Hall*, 4 Bing. 607. See also *The Glenfruin*, 10 P.D. 103; *The Maori King* v. *Hughes* (1895), 2 Q.B. 550; *The Waikato* (1899), 1 Q.B. 56; *Mercantile S.S. Company* v. *Tyser*, 7 Q.B.D. 73.

(6) *Allan* v. *James*, 3 Com. Cas. 10.

(24) Shipowner is to be liable for any damage to any goods which are capable of being covered by insurance (1).

(25) Detention by railways (2).

(26) Perils of land transit (3).

(27) Collision (4). *See also* "Accident."

(28) Limit of liability (5).

(29) Loss by fire (6). *See also* "Fire."

(30) Mortality (7).

(31) Navigation (8).

(32) Exceptions expressly negativing the shipowner's warranty of seaworthiness (9).

(33) Negligence of shipowner's servants (10).

(34) Not liable for damage unless goods are marked in a particular way (11).

(1) *Taylor* v. *Liverpool and Great Western Steamship Company*, L.R. 9 Q.B. 546; *Phelps* v. *Hill* [1891], 1 Q.B. 605, 613; *Crooks* v. *Allan*, 5 Q.B.D. 38; *Price* v. *Union Lighterage Company* (1903), 1 K.B. 750.

(2) *Letricheux* v. *Dunlop* (1891), 19 Ct. of Sess. Cas. 208; *Furness* v. *Forward*, 2 Com. Cas. 223; *Richardson* v. *Samuel* (1898), 1 Q.B. 261.

(3) *De Rothschild* v. *Royal Mail Company*, 7 Ex. 734, at p. 743. See also 2 A.C., at p. 509.

(4) *Chartered Mercantile Bank* v. *Netherlands India Steam Navigation Company*, 10 Q.B.D. 521; per Lord Esher, at p. 531. See also *The Xantho*, 12 A.C. 503.

(5) *Tattersall* v. *National Steamship Company*, 12 Q.B.D. 297; *Balian* v. *Jolly*, 6 T.L.R. 345.

(6) *Forward* v. *Pittard* (1785), 1 T.R. K.B., at p. 27; *Hyde* v. *Trent and Mersey Navigation Company*, 5 T.R., at p. 389; *Garside* v. *Trent and Mersey Navigation Company*, 4 T.R. 581; *Bourne* v. *Gatliffe*, 11 C. and F. 45.

(7) *Leuw* v. *Dudgeon*, 3 Mar. L. Cas. 3.

(8) *Lawrie* v. *Douglas*, 15 M. and W. 746; *The Accomac*, 15 P.D. 208; *Garston Sailing Ship Company* v. *Hickie*, 18 Q.B.B. 17; *Good* v. *London Steamship Owners' Association*, 6 C.P. 563; *Spence* v. *Chadwick*, 16 L.J. Q.B. 313; *Canada Shipping Company* v. *British Shipowners' Mutual, etc.*, 23 Q.B.D. 342; *The Warkworth*, 9 P.D. 145; *Rolles* v. *Newall*, 25 Q.B.D. 335.

(9) See *Cargo ex Laertes*, 12 P.D. 187; *Rathbone* v. *M'Iver* (1903), 2 K.B. 378; *Upperton* v. *Union Castle Company*, 8 Com. Cas. 96.

(10) *Moore* v. *Harris*, 1 A.C. 318; *Steel* v. *State Line Steamship Company*, 3 A.C. 72; *Hayn* v. *Culliford*, 4 C.P.D. 182; *The Ferro* [1893], P. 38; *Norman* v. *Binnington*, 20 Q.B.D. 475; *The Southgate* [1893], P. 329; *The Carron Park*, 15 P.P. 203; *Barker* v. *M'Andrew*, 34 L.J. C.P. 191; *Bruce* v. *Nicolopulo*, 11 Ex. 129; *Carmichael & Co.* v. *Liverpool Sailing Ship Owners' Mutual Society*, 19 Q.B.D. 242; *Westport Coal Company* v. *M'Phail* (1898), 2 Q.B. 130; *The Undaunted*, 55 L.J. Ad., at 24; *The United Service*, 9 P.D. 3; *Dobell* v. *The Steamship Rossmore Company*, 8 Asp. M.C. 339; *The Glenochil*, 8 Asp. M.C. 218; *The Rodney*, 9 Asp. M.C. 39; *Irrawaddy Flotilla Company* v. *Bugwandass*, 7 Asp. M.C. 129. See also the American Harter Act of 1893.

(11) See *Cox* v. *Bruce*, 18 Q.B.D. 147; *Parsons* v. *New Zealand S.S. Company* (1901), 1 K.B. 548.

(35) Perils of the sea.
(36) Quality unknown.
(37) Quantity unknown.
(38) Liberty to tow (1).
(39) Weight unknown (2).

(1) *Stuart* v. *British and African Steam Navigation Company*, 2 Asp. M.C. 497; *The Bernina*, 6 Asp. M.C. 112.
(2) *Jessel* v. *Bath*, L.R. 2 Ex. 267; *Bradley* v. *Dunipace*, 31 L.J. Ex. 210; *The Emilien Marie*, 2 Asp. M.C. 514.

APPENDIX

TIME CHARTER—CHARTER-PARTY

It is this day mutually agreed between.....
.....of.....hereinafter
designated Owners of the good Steamship.....
.....described as follows:
Port of Registry.....; Flag.....;
Tonnage, Gross.....; Net.....;
Horse Power.....; Steam Winches.....;
Water Ballast.....tons; Classed.....
to carry.....Tons deadweight of Cargo and Bunkers upon Lloyd's assigned Summer freeboard, and of extreme draft .....when fully laden; having.....cubic feet capacity for Cargo, exclusive of Bunkers, which will contain .....tons of coal, and to steam.....knots fully laden on a consumption of.....tons best Welsh Coals; now.....
..... And .....
of .....as Agents for Charterers, as follows; that is to say:—

1. The said Owners agree to let, and the said Charterers agree to hire the said Steam Ship for the term of Calendar Months from the day she is placed at the disposal of the Charterers, at (after having been dry-docked, and bottom cleaned and painted, at Owners' expense), in such dock, wharf, or place as Charterers may direct, she being then ready, with clear holds, to receive Cargo; and being tight, staunch, strong, and in every way fitted for the service, and with full complement of Officers, Seamen, Engineers, and Firemen, for a Vessel of her tonnage, and to be so maintained while under this Charter; within the following limits; that is to say:—

2. Between ports or places in any of the following:—the United Kingdom, Continent of Europe, Mediterranean, Adriatic, Black Sea, Sea of Azoff, North or South America, Africa, East or West Indies, Java, Philippines, Australia, New Zealand, New Caledonia, and/or any other places not East of Singapore, between 60° North latitude, and 40° South latitude; but no Baltic or White Sea between 1st October and 1st April, no British North America between 1st September and 1st April; as Charterers shall direct, on the following conditions:—

3. The Owners shall provide and pay for all provisions, wages,

and shipping and discharging fees of the Captain, Officers, Engineers, Firemen, and Crew; shall pay for the Insurance on the Vessel, also for all deck, cabin, and engine room stores, including water, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, expense of loading and unloading Cargoes, Suez Canal Dues, and all other charges appertaining to the Cargoes they may put on board.

4. The Charterers shall pay for the use and hire of the said Vessel at the rate of

sterling per gross register Ton per Calendar Month, commencing at noon of the day after she is placed at Charterers' disposal as above (Sundays and Holidays excepted), and notice thereof having been given to Charterers, such notice to be given between the hours of 9 A.M. and 5 P.M., but not after 2 P.M. on Saturdays, nor on Sundays, nor Holidays, at and after the same rate for any part of a month; hire to continue until the hour of her redelivery to Owners (unless lost or Charter be cancelled) at a safe port in the United Kingdom, or Continent (Bordeaux to Hamburg), or in the Mediterranean, or Adriatic Sea, or in the United States (Baltimore to Boston).

5. The hire shall not commence before
unless with Charterers' consent, and Charterers have liberty to cancel this Charter should the Steamer not be ready, in accordance with the provisions hereof before
the said option of cancelment to be declared on notice of readiness being given.

6. Payment of the said hire to be made as follows:—In Cash, Monthly in advance, in London, less an address commission of 2½ per cent., which shall be deducted from each payment of hire. In default of such payment as herein specified, the Owners shall have the faculty of withdrawing the said Steamer from the service of the Charterers, without prejudice to any claim they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

7. The whole reach of the Vessel's holds, decks, burthen, and passenger accommodation, if any (not being more than she can reasonably stow and carry, and not less than the warranted deadweight capacity), shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, and stores. The Cargo or Cargoes shall be loaded and/or discharged in any safe dock, or at any wharf, or such usual place that Charterers or their Agents may direct, where the Vessel can safely lie as usual and customary for Steamers. The Steamer is to load and discharge Cargo by day and by night, and as rapidly as possible when required by Charterers or their Agents. Charterers to have liberty to remove any stanchions, ladders, and wooden bulkheads (consistent with the safety of the Ship), same to be replaced by them at their own expense.

8. The Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance, with any cranes and/or winches on board, also with Ship's crew and boats, and in tallying and loading and discharging the Cargo and bunkers.

9. The Captain to furnish the Charterers, their Agents or Supercargo, when required, with a true copy of Deck and Engineer's Logs, showing the course of the Steamer and distance run, and the Consumption of Coal, and to take every advantage of Wind, by using the Sails, with a view to economise the expenditure of Coal.

10. The Owners shall provide and maintain proper and ample supply of ropes, and all running and other necessary gear for the efficient handling and working of the Cargo with despatch, and for dealing with weight up to five tons, also ballast as required for the safe and expeditious navigation of the Steamer. If Steamer be employed loading or carrying grain in bulk, the Owners to fit requisite shifting boards, and Owners to comply with the requirements of the Acts of Legislative Enactments for the time being.

11. The Charterers are to have the option of carrying Cattle and/or any Live Stock in the between decks and/or upper decks, the Owners to provide condenser for supply of water, and also proper ventilation as practicable.

12. The Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers, as regards employment, agency, or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading by the orders of Charterers or of their Agents, or in otherwise complying with the same, and Owners shall be responsible for full, true and proper delivery of the Cargo. The Stevedore shall be employed and paid by the Charterers, but this shall not relieve the Owners from responsibility as to proper stowage, which must be controlled by the Captain, who shall keep a strict account of all Cargo loaded and discharged as usual.

13. The act of God, the King's enemies, restraints of princes and rulers, and perils of the seas excepted. Also fire, barratry of the Master and Crew, pirates, collisions, strandings, and accidents of navigation, or latent defects in or accidents to, hull and/or machinery, and/or boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the Pilot, Master, Mariners, or other persons employed by the Shipowner, or for whose acts he is responsible. Charterers not answerable for any negligence, default, or error in judgment of Trimmers or Stevedores employed in loading or discharging the Cargo. The Steamer has liberty to sail without Pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property.

14. The Charterers shall accept and pay for all Coal in the

Steamer's bunkers at time of delivery, and the Owners shall, on the expiration of this Charter-Party, pay for all Coal then left in the bunkers, at current market prices at the respective ports. Owners are to give Charterers the use and benefit of any coaling contracts they may have in force, both at home and abroad, if so required by Charterers. Cash advanced by Charterers or their Agents at any ports for Owners' disbursements, shall be subject to 2½ per cent. commission.

15. The Charterers shall have liberty to send Passengers in the available accommodation by the Vessel upon any voyage made under this Charter, the Owners finding provisions and all requisites, except liquors, the Charterers paying at the rate of per diem for each First Class Passenger, and at the rate of per diem for each Second Class Passenger, during the time such Passengers are on board the Steamer.

16. The Charterers to have the right of keeping on board a Supercargo, at their own expense, during the continuance of this Charter-Party; and they are also to have the liberty of sub-letting this Steamer, if required by them, on Admiralty or other service.

17. The Steamer to be marked in respect to load-lines and freeboard as required by the Authorities for the time being, it being agreed that the aforesaid hire is based upon the Steamer affording the warranted dead-weight capacity on assigned Summer freeboard.

18. The Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to Charterers or their Agents as required.

19. If the Charterers should have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall, on receiving particulars of the Complaint, investigate the same, and, if necessary, make a change in the appointments.

20. The Owners to be liable for any delay of quarantine arising from the Crew having communication with the shore at any infected port should the Steamer call at such places, also for any loss of time through detention by Customs Authorities caused by smuggling or other infraction of the laws of the Country on the part of Officers and Crew.

21. The Captain to hoist any house flag that may be required by Charterers, and to paint funnel as required by them.

22. The Charterers shall have the option of continuing this Charter for one, two, or three further periods of months, on giving notice thereof to the Owners days previous to expiration of the current period.

23. Should the Vessel be on her voyage toward port of return delivery at time a payment of hire is due, said payment shall be made for such a length of time as Owners or their Agents, and Charterers or their Agents, may agree upon as the estimated time necessary to complete the voyage; and when the Vessel is re-

delivered, any difference shall be refunded by Owners, or paid by Charterers, as the case may require. Should the Steamer be upon a voyage at the expiration of either of the within-named periods, the Charterers are to have the use of the Steamer at the same rate and conditions for such extended time as may be necessary for the completion of their contemplated voyage, and in order to bring the Steamer to a port of redelivery as provided.

24. Should the Vessel be lost, the hire is to cease and determine at noon on the day of her loss, and if missing, from noon of the date when last heard of, and any hire paid in advance and not earned shall be returned to Charterers.

25. The Charterers shall have the option at any time during this Charter of purchasing this said Vessel for the sum of against which any amount paid for the hire of the said Vessel shall be set off and deducted, but the purchaser shall pay Insurance on the Amount of Purchase money, also cost of wages, victualling, and stores from the date of this Charter to the completion of Sale.

26. In the event of loss of time from deficiency of men or stores, breakdown of machinery (whether partial or otherwise), collision, stranding, damage, or interference by authorities preventing the working of the Vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service at the place where the accident occurred; and should the Vessel, from any of the aforementioned causes, put into any other ports than those to which she is bound, the Port Charges, Pilotages, and other expenses at those ports, loss of time, and all other expenses consequent of putting in, shall be borne by the Owners; also, should the Steamer put back while on voyage, by reason of any accident, the hire shall be suspended from the time of her putting back until she be again in the same position and the voyage resumed therefrom; but should the Vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall be at the Charterers' risk and expense. If upon the voyage her speed be reduced by the breakdown of machinery or other casualty, the time lost, and the cost of the extra Coal, if any, consumed in consequence thereof, shall be borne by the Owners. The Charterers shall not be responsible for any damage to the Steamer arising from any cause whatever.

27. In the event of this Charter continuing in force for a longer period than six months, the Charterers may, at such interval, should they consider it necessary, require the Owners to dry-dock the Steamer, to have bottom cleaned and painted, which shall be done at Owners' expense, and the hire shall cease from the time the Steamer is available for such purpose until she is again, after the execution of the said work, placed at the disposal of Charterers, between the hours of 9 A.M. and 5 P.M., but not after 2 P.M. on Saturdays, nor on Sundays nor Holidays.

28. In the event of war or epidemic preventing, or interfering

with, the employment of the Steamer in the trades for which the Steamer may be engaged, also in the event of any casualty to the Steamer during the currency of this Charter, or detention of the Steamer by the Authorities at home or abroad, in consequence of legal action against the Owners of the Steamer, whereby the Steamer is rendered unavailable for Charterers' service for a period of one month, the Charterers have the liberty of cancelment of this Charter or suspension of the Charter until the service can again be resumed, without prejudice to any right of claim for damages which the Charterers may possess by reason of the detention; the said cancelment to take effect after fourteen days' notice thereof given to the Owners, and the Steamer being in port. In the event of the nation to which this Vessel belongs becoming engaged in hostilities, Charterers are to have the option of cancelling Charter-Party, and taking out again at Charterers' risk and expense all Cargo that may have been shipped.

29. All derelicts and salvage shall be for Owners' and Charterers' equal benefit.

30. The Owners shall have a lien upon all Cargoes for any amounts due under this Charter; and Charterers to have a lien on the Ship for all moneys paid in advance, and not earned, and for all damages against the Owners.

31. The Owners shall keep the Charterers indemnified to the same extent that would apply for Owners if working the Steamer for their own benefit in the trades in which Steamer is employed by Charterers, against all such claims and risks as are covered by the Protection and Indemnity Associations, also to afford Charterers the benefits of any other Associations for Defence or other purposes in which the Steamer may be entered.

32. Average, if any, according to York-Antwerp Rules.

33. Penalty for non-performance of this contract, estimated damages.

34. Should any dispute arise between the Owners and the Charterers, the matters in dispute shall be referred to two persons in London, one to be appointed by each of the parties hereto, and the two so chosen may, if required, appoint an umpire, and their decision, or that of any two of them, shall be final and binding, and for the purpose of enforcing any award this agreement may be made a rule of Court.

35. A commission of Five per cent. on the amount of hire under this Charter, and which may be deducted from the hire as paid, is due on signment hereof, and payable by the Owners to

Witness

Witness

BALTIC AND WHITE SEA CONFERENCE COAL CHARTER

FROM EAST COAST OF ENGLAND AND SCOTCH PORTS TO ALL PORTS IN THE BALTIC, SCANDINAVIA, AND WHITE SEA

It is this day mutually agreed between Owners of the good Screw Steamer called the of tons net register, now and expected ready to load on or about and Charterers.

1. That the said Steamer being tight, staunch, and strong, and in every way fitted for the Voyage, shall, with all possible despatch, proceed to and there load in the customary manner from the Charterers a full and complete Cargo of Coal not exceeding tons, nor less than tons, and not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions, and Furniture; and being so loaded shall therewith proceed with all possible despatch to and deliver the same alongside any Wharf or Floating Depôt or into Lighters, as may be ordered by the Consignees of the Cargo, where she can safely lie always afloat.

2. Freight to be paid at the rate of per ton of 20 cwts., intaken weight, provided the Steamer arrives without having broken bulk. The Freight to be paid on unloading and right delivery of Cargo in Cash at Port of Discharge at current rate of exchange for approved sight Bills on London. The Consignees to pay freight on account during delivery if required by the Captain.

3. The Vessel to be free, both at Ports of Loading and Discharge, of any Address Commission or Lastage Money notwithstanding any local Custom. If contrary to this clause any Address Commission or Lastage Money is imposed, the Receivers of the Cargo must refund the amount to the Vessel.

4. Charterers to pay all customary Dues and Duties on the cargo at Port of Loading, also cost of separation and levelling should the Cargo be composed of different parcels. In like manner the Receivers to pay all Dues and Duties on the Cargo at Port of Discharge; the Owners to pay trimming, port dues, pilotage, towage, and other charges appertaining to the Steamer.

*) Clause A to be used for Tyne and Humber ports.

5. A*) The Cargo to be loaded in running hours (Sundays, Pay Saturdays, Cavilling Days, and Colliery Holidays excepted). Time to count when written notice of readiness to receive the

entire Cargo is given to the Staithman or Colliery Agent, or handed in to his office between the hours of 6 A.M. and noon.

The date of loading not to count before 6 A.M. on the
If the Steamer be not ready within 48 hours thereafter, 12 hours extra loading time to be allowed, and if she should not be ready until after the 48 hours, then 6 hours over and above the 12 hours to be allowed for each 24 hours of unreadiness, such total extra time not to exceed hours. Any time occupied in the shipment of Bunker Coals not to count (unless used by the Shippers of the cargo), nor time used in shifting for the purpose of bunkering. In the event of the Steamer shifting for Bunker Coals, and not returning to her loading berth before noon on Saturday, the loading hours shall not be resumed until 6 A.M. on the following Monday, unless the loading is continued. Should any of the cargo be shipped during the above excepted periods, only the time actually occupied in shipping coals to be reckoned in computing the Steamer's time for loading. If the Steamer be longer detained, the Charterers to pay Demurrage at the rate of per running hour. The parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lock-outs of Workmen, disputes between Masters and Men, and any other unavoidable accidents or hindrances of what kind soever beyond their control, either preventing or delaying the working, leading, or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading. In the event of any stoppage or stoppages arising from any of these causes continuing for the period of *) from the time of the Steamer being ready to load at the Colliery or Collieries for which she is stemmed, this charter shall become null and void, provided however that no cargo shall have been shipped on-board the Vessel previous to such stoppage or stoppages.

*) Insert days agreed upon.

The Vessel to be moved to and from the spout as required by the Staithman during the course of her loading at the Shipowner's risk and expense.

In case the Steamer is not ready to complete her loading when she has once begun, any time occupied in partial loading only to count, but at least one half of the total loading hours as above provided to be allowed to the Charterers for completing the loading. This Clause not to apply to bunkering operations or shifting for the purpose of loading Bunker Coals.

A Sailing Telegram to be sent to the Charterers when the Steamer leaves her last port, or in default twenty-four hours more to be allowed for loading.

B*) *The cargo to be loaded in running hours (Sundays, Pay Days, Cavilling Days, and Colliery Holidays excepted). Time to count when written notice of readiness to receive the entire cargoes given to the Colliery Agent or handed in to his office between the hours of* 9 A.M. *to* 5 P.M. *or* 9 A.M. *to* 2 P.M. *on Saturday.*

*) *Clause B to be used for Scotch ports.*

The date of loading not to count before 6 A.M. *on the*
If the Steamer be not ready within 48 *hours thereafter,* 12

At Firth of Forth ports owners may stipulate for loading time to count from first high water after arrival in roads, and notice given.

*hours extra loading time to be allowed, and if she should not be ready until after the 48 hours, then 6 hours over and above the 12 hours to be allowed for each 24 hours of unreadiness, such total extra time not to exceed hours. Accumulative hours not to be imposed should the readiness of the Steamer be prevented by reason of congestion of traffic in the loading dock or harbour, always provided that she has arrived in the roads. Any time occupied in the shipment of the Bunker Coals not to count (unless used by the Shippers of the cargo), nor time used in shifting for the purpose of bunkering. In the event of the Steamer shifting for Bunker Coals, and not returning to her loading berth before noon on Saturday, the loading hours shall not be resumed until 6 A.M. on the following Monday, unless the loading is continued. Should any of the cargo be shipped during the above excepted periods, only the time actually occupied in shipping coals to be reckoned in computing the Steamer's time for loading. If the Steamer be longer detained, the Charterers to pay Demurrage at the rate of per running hour. The parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lock-outs of Workmen, disputes between Masters and Men, and any other unavoidable accidents or hindrances of what kind soever beyond their control, either preventing or delaying the working, leading, or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading. In the event of any stoppage or stoppages arising from any of these causes continuing for the period of *) from the time of the Steamer being ready to load at the Colliery or Collieries for which she is stemmed, this charter shall become null and void, provided however that no cargo shall have been shipped on-board the Vessel previous to such stoppage or stoppages.*

**) Insert days agreed upon.*

The Vessel to be moved to and from the spout as required by the Staithman during the course of her loading at the Shipowner's risk and expense.

In case the Steamer is not ready to complete her loading when she has once begun, any time occupied in partial loading only to count, but at least one half of the total loading hours as above provided to be allowed to the Charterers for completing the loading. This clause not to apply to bunkering operations or shifting for the purpose of loading Bunker Coals.

A sailing telegram to be sent to the Charterers when the Steamer leaves her last port, or in default twenty-four hours more to be allowed for loading.

6. The Vessel to have sufficient Bunker Coals on board for her use, Owners being free to purchase them as they may elect. The Bunkers to be kept properly separated from Cargo to Charterers' satisfaction, and the quantity to be endorsed on the Bill of Lading.

*) These two clauses are alternatives; whichever one is agreed when chartering, the other to be deleted.

*) No Bunker Coals to be stowed in the cargo holds without the permission of the Charterers.

*) If any Bunker Coals stowed in the cargo holds, to be properly separated to the satisfaction of Charterers.

7. The Captain, Owner, or Agent is hereby bound to sign Bills of Lading, as per form on the back hereof (weight unknown), at the office of Charterers or their Agents within 24 hours after the cargo is on board.

8. Charterers to have permission to re-charter or sub-let at any rate of freight, without prejudice to this Charter, and Bills of Lading to be signed at any rate of freight without prejudice to this Charter. If such freight be lower, the difference to be paid in Cash before signing Bills of Lading, if higher, to be endorsed on Bills of Lading, or, in the option of the Charterers, to be refunded to them by the Owners after payment of the freight.

9. The Act of God, the King's Enemies, Restraints of Princes and Rulers, and Perils of the Seas excepted, also Fire, Barratry of the Master and Crew, Pirates, Collisions, Strandings, and Accidents of Navigation, or latent defects in, or Accidents to Hull and/or Machinery and/or Boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the Pilot, Master, Mariners, or other persons employed by the Shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the Owner of the Ship, or by the Ship's Husband or Manager. The Steamer has liberty to call at any ports in any order, to sail without Pilots, to tow and assist Vessels in distress, and to deviate for the purposes of Saving life and property.

10. In case of Average, the same to be settled according to York-Antwerp Rules, 1890. Should the Steamer put into any port leaky or with damage, the Owners shall, without delay, inform the Charterers thereof.

11. The Cargo to be taken from alongside by Consignees at Port of Discharge, free of expense and risk to the Steamer, at the average rate of tons per day (Sundays and Legal Holidays excepted), provided Steamer can deliver at this rate. Time for discharging to commence to count when the Vessel is reported at the Custom House, and ready (whether in berth or waiting for a berth) to deliver, and written notice of such readiness given to the Receivers at or before midday; if ready after midday, time to count from 6 o'clock the following morning notwithstanding any Custom or Law of the Port of Discharge. If the Steamer is not despatched within the stipulated time, Consignees to pay Demurrage at the rate of per running day or *pro rata* for part of a day. In case of strikes, lock-outs, civil commotions, accidents, or any other causes beyond the control of the Consignees which prevent or delay the discharging, such time is not to count unless the Steamer is already on Demurrage.

When Clause 11 is used, Clause 12 to be erased.

At Cronstadt and Petersburg to discharge as fast as steamer can deliver.

12. The cargo to be loaded and discharged in running hours (Sundays and Legal Holidays excepted). The cargo to be taken from alongside by Consignees at Port of Discharge, free of expense and risk to the Steamer. Time for discharging to commence when the Vessel is reported at the Custom House and ready (whether in berth or waiting for a berth) to deliver, notwith-

Clause 12 may be used for Swinemunde, Stettin, and Fairwater, in which case Clause 11 to be erased.

standing any Custom or Law of the Port of Discharge. If the Steamer is despatched sooner than the time allowed aforesaid, the Owners to pay Merchants per hour for every hour saved, and if the Steamer is not despatched within the stipulated time, Consignees to pay Demurrage at the rate of per running hour. In case of strikes, lock-outs, civil commotions, accidents, or any other causes beyond the control of the Consignees, which prevent or delay the discharging, such time is not to count unless the Steamer is already on Demurrage. The loading to be on conditions of loading guarantee in this Charter-Party, but no despatch money to be charged on accumulative hours. Charterers have the option, when a certain number of hours are fixed for loading and discharging, to insert in the Bill of Lading any number of hours they may elect for discharging, but not exceeding two-thirds of the initial hours, they paying Demurrage or charging Despatch Money at Port of Loading for the time shown between the number of hours occupied in loading and the number endorsed upon Bill of Lading.

Where there are hours for loading free of despatch money and hours for discharging with despatch money, Clauses 5 and 12 may be combined.

13. Consignees to effect the discharge of the cargo, Steamer paying* per ton of 20 cwts., and providing only steam, steam winches, winchmen, gins and falls.

*) Owners may insert the words "Current price" or a fixed price.

14. The Charterers' liability shall cease as soon as the cargo is shipped, and the advance of Freight, Dead Freight, and Demurrage in loading (if any) are paid, or a Banker's guarantee given to pay to the Owners such sum as shall be proved to be legally due, the Owner having a lien on the cargo for Freight, Demurrage, and Average.

For all Russian ports (Finland excluded) Clause 13 to be erased.

15. Penalty for non-performance of this Agreement, proved damages.

16. Should the Steamer not be ready to load at 6 A.M. on or if any misrepresentation be made respecting the size, position, or condition of the Steamer, Charterers to have the option of cancelling this Charter, such option to be declared on notice of readiness being given.

17. In every case the Owner shall appoint his own Broker or Agent both at the Port of Loading and at the Port of Discharge.

18. Five per cent. Brokerage is due by the Vessel to on signing this Charter, Ship lost or not lost, and the Ship is to be cleared at the Customs at Port of Loading by Owner's Agent.

ANGLO-AMERICAN COTTON— CHARTER-PARTY

As agreed in London, July 1895

.....190

It is this day mutually agreed between.....
.....owners of the Steamship.....
.....of.....tons net register, British measurement; classed 100 A1, now at.....and.....
..... and .....
.....of.....Charterers, as follows:—

1. That the said steamship being tight, staunch, and strong, and in every way fitted for the voyage, and provided with sufficient water ballast to enable her to carry a full cargo of COTTON, shall proceed in ballast as ordered at .....
.....to load in a safe place at one of the following ports, GALVESTON, NEW ORLEANS, or MOBILE, at Charterers' option, according to custom, unless otherwise provided herein, a full and complete cargo of Cotton and/or other lawful merchandise under Deck, and being so loaded shall therewith proceed to a safe port in the UNITED KINGDOM or on the Continent, between HAVRE and HAMBURG, both inclusive, or in the Baltic (not higher than CRONSTADT, including ST PETERSBURG or NEWPORT), SEVASTOPOL, GENOA, NAPLES, SALERNO, or BARCELONA, as ordered on signing Bills of Lading, or as near thereto as she may safely get, and discharge the same in the usual and customary manner at such port in accordance with Bills of Lading, and in such dock or alongside such wharf or in other safe place, always afloat, as Charterers or their Agents may appoint, in consideration whereof Charterers are to pay freight as follows:—

.....Shillings.....pence Sterling per net registered ton as above, if ordered to Liverpool.

.....Shillings.....pence Sterling per net registered ton as above, if ordered to Havre, Antwerp, Rotterdam, or Bremen.

.....Shillings.....pence Sterling per net registered ton as above, if ordered to any other port in the United Kingdom or Continent as above.

.....Shillings.....pence Sterling per net registered ton as above, if ordered to.....

.....Shillings.....pence Sterling per net registered ton as above, if ordered to discharge at two ports in the same country,

The Brokerage of 5 per cent. is due on the signment of this Charter Party to .....steamer lost or not lost.

on the same coast within above range, or two ports, Antwerp and/or Rotterdam and/or Bremen and/or Hamburg.

.....

all in British Sterling, payable in cash at port of discharge, on right delivery of cargo; if on the Continent at the exchange for Bankers' short sight bills on London. If through excepted perils any of the cargo, other than deck cargo, be lost or so damaged that it does not go forward under deck in this Steamer to its destination, the amount of Chartered freight payable hereunder shall be proportionately reduced on final settlement of freight at Steamer's port of discharge.

2. The whole of the under deck and fully enclosed space of the said steamer, where cargo has been carried before (with the exception only of the saloons and cabins, engine and boiler house, engine room, ordinary side bunkers, and cubic feet space in for bunkers and the necessary room for the accommodation of the crew, stores, provisions, and tackle) shall be for the sole use and at the disposal of Charterers for cargo, and no other coal, goods or cargo shall be taken on board unless by the written permission of Charterers. The Charterers to have option of shipping damaged Cotton on deck, consistent with the seaworthiness of the steamer, such to be at the Shipper's risk and expense, including all expenses incidental to Deck cargo at ports of loading and discharge, and the Charterers to fully insure the freight thereon. All moveable wooden bulkheads and shifting boards, and/or other removable wooden obstructions in the holds to be taken down and carried on deck if required by Charterers. Owners shall, if required, furnish Charterers with a plan showing every cargo compartment or space in vessel, as per builder's plan, with cubic capacity of each.

3. The Owners guarantee vessel to have a capacity according to builder's plans of cubic feet cargo space, approachable by hatchways not less than three feet square. The hold measurements to be taken from under the beams to the ceiling, and from batten to batten, and Owners guarantee to carry (if tendered) not less than tons weight of dead weight cargo when fully loaded, and that she can carry tons (of 2240 pounds) of cargo on 15 feet draught, even keel. Should the builder's plan be disputed, the steamer to be re-measured at port of discharge or on her first return to the United Kingdom by approved Surveyors. The cost of measuring to be paid by the Charterers, should the accuracy of the builder's plans be established, otherwise by the Owner.

4. The vessel is not to retain on board at loading port more coal than is sufficient to steam to Newport News or Norfolk, Va., at one of which ports she must coal on the homeward passage. Should the steamer be ordered to the Baltic, she is to coal at any one port in the United Kingdom, at Captain's option, and should she be ordered to the Mediterranean or Black Sea, she is to coal at Gibraltar or Algiers.

5. The Master to give written notice before noon to the

Charterers or their Agents when his vessel is entered at Custom House and ready to load inside the Bar or Harbour in the loading berth designated by Charterers or their Agents (such berth to be furnished immediately upon the Captain's application or lay days to commence), with all holds clear and clean swept and ready in every respect to take in cargo, and the lay days to commence on the following morning; but should the steamer not be entered and ready as above, and have given written notice to this effect before noon of the Charterers to have option of cancelling this Charter-Party. Lay days shall not commence before without written permission of the Charterers.

6. One running day and a quarter per 100 tons net register (Sundays and legal holidays excepted) are to be allowed Charterers for loading the cargo, and in case vessel is longer delayed by default of Charterers, or their Agents, they shall pay demurrage at the rate of fourpence per net register ton per running day for each and every full day so detained. If sooner loaded the vessel to pay Charterers, or their Agents, the sum of two pence Sterling per net register ton per day despatch money for every running day so saved. Charterers may finish loading on the day the steamer is cleared at the Custom House without counting it as a lay day, neither shall it count for despatch money.

Owners or Master shall cable " " at vessel's departure from last port to enter upon this charter.

7. Charterers to pay for compressing Cotton, loading, stowing and lightering cargo at port of loading, and branding and marking (if any). Charterers' Stevedore to be employed for loading under the direction of the Master, but Charterers not responsible for improper stowage. Owners to pay Charterers 2s. 6d. per net register ton, in consideration of which Charterers agree to pay port charges at loading port or ports on outward cargo, viz. Levee dues, quarantine fees (but not fumigating), wharfage, watching, tarpaulin hire or shed dues and outward pilotage; also U. S. tonnage dues and inward pilotage for vessels arriving in ballast.

8. Vessel to furnish the use of her steam winches (with steam sufficient to drive them) and tackle in loading, also to load at night and/or Sundays and holidays if required by Charterers, they paying all extra expenses and labour incurred. Vessel to trim her ballast as required. Charterers to have the option of loading the vessel in the channel, bay, or stream, or of designating the wharf for loading, and if required by them to shift more than once, they to pay cost of towage; and it is agreed that the cargo shall be delivered according to the customs and usages of the ports of discharge, unless otherwise expressed herein. Vessel shall, if ordered to a bar port, load at the wharf or in the channel, bay, or stream, to such a draught as the Pilots deem safe to cross the bar. Such draught to be at least six inches less than the officially notified water on the bar. The Master is, however, at liberty to cross the bar on any less draught than above stipulated, on con-

dition that Vessel pays such extra expenses as may be incurred thereby. In all other cases the whole expense of loading outside the bar (including lighterage) to be paid by Charterers as per clause 7. In any event all cargo lightered to be at shipper's risk.

9. Master to sign Bills of Lading as and when presented without reference or prejudice to this contract, on receipt of Press orders and shipper's guarantee to keep cargo insured; and in the absence of fraud, clerical or obvious errors, the Bills of Lading, if signed by the Master, and the number of bales agree with the Mate's and/or tally clerk's receipts, shall be conclusive evidence against the owners of the quantity of cargo shipped. In regard to cotton shipped on Through Bills of Lading from interior points, it is agreed and understood that the cargo described in the "Master's Receipt" or "Master's Bill of Lading" shall be delivered at the port of discharge upon presentation of the said Through Bill of Lading provided that the particulars agree with those stated in such Master's Receipt or Bill of Lading. The freight as per Bills of Lading (and/or Through Bills of Lading) is to be accepted by the Master and/or owners towards payment of the amount of chartered freight due under this Charter-Party. Any difference in amount of freight between the Bills of Lading (and/or Through Bills of Lading), and the total gross chartered freight, as above, to be settled at port of loading before the vessel sails; if in vessel's favour, to be paid in cash at current rate of exchange, less vessel's disbursements, and insurance and commission on same; if in Charterers' favour, by usual Master's Bill, payable 5 days after arrival at port of discharge, or upon collection of freight (whichever occurs first), and such bill is hereby made by Owners a charge on freight as per Bills of Lading, and the said freight is hereby hypothecated as security for said bill. The amount of said bill shall be fully insured against all risks from the time of signing Press or Mate's Receipts at Charterers' risk and expense, and be subject to General Average, Salvage Charges, and all risks incidental to freight. Certificate of Insurance to be attached to the Draft, and given up on payment of same.

10. Sufficient cash for vessel's necessary disbursements, if required by the Captain, shall be advanced at the current rate of exchange, vessel paying 2½ per cent. commission thereon, for which the Master shall execute a legal draft payable 60 days after date thereof or five days after arrival at port of discharge or upon collection of freight (whichever occurs first), against the amount of freight due under this charter, and said freight and vessel are hereby hypothecated as security for said draft (which shall take precedence of all other claims against the vessel and her freight), and said draft shall be insured by the Charterers at vessel's risk and expense, the Certificate of Insurance to be attached to the draft.

11. In case steamer is in general average at port of loading, the Agency shall remain with the Charterers (or their agents), but the custody commission to be waived.

12. The vessel shall be consigned to Charterers or their Agents at port of loading, and be entered and cleared by them at Custom House, paying them per cent. commission on the freight, as per charter, and a fee of £10 10s. for doing ship's business.

13. All freight payable under this charter, on Through Bills of Lading and on the usual ship's Bills of Lading and/or Master's Receipts shall (subject to the vessel's lien thereon for chartered freight) belong exclusively to the Charterers, and shall be collected by their Agents at the port of discharge, it being hereby agreed that the vessel shall be consigned to the said Agents, and pay them Ten Guineas for attending to the vessel's inward business; if, however, the consignment at the port of discharge is placed in other hands, vessel shall pay them as liquidated damages the sum of £75, and shall pay the amount of the Captain's bill or bills for disbursements, and/or freight differences, in cash to the holders of the said bills on the day the said vessel is entered at the Custom House. All cargo on board under this charter in excess of the aggregate quantity required by Bills of Lading shall belong to the Charterers and be delivered to their Agents at port of discharge without any claim by the ship, average and salvage claims excepted.

14. The Act of God, restraint of rulers and people, war, fire, epidemics, strikes or lock-outs of stevedore's men, draymen or press hands, detention or destruction of goods on railway or at press, pirates, collisions, and all and every danger and accidents of the seas, canals, and rivers, and of navigation of whatever nature or kind during the performance of this charter always excepted. Charterers or stevedores shall not be responsible for any damages occurring while loading or discharging cargo by reason of any defect in vessel's machinery or tackle, nor for neglect on the part of vessel's officers or crew. The vessel to have liberty to sail with or without Pilots, and to tow and to deviate for the purpose of and for assisting vessels in distress. It is also mutually agreed that this charter is subject to all the terms and provisions of, and to the exemptions from liability contained in, the Act of Congress of the United States, relating to navigation, etc., approved on the 13th day of February 1893. General average shall be adjusted according to York/Antwerp Rules 1890.

15. If any dispute shall arise regarding any of the clauses in this charter, or as to any matter or thing to be done or omitted in pursuance thereof, or as to any breach of the same, or as to the rights, duties, or liabilities of either of the parties, it shall be settled by arbitration at the port where the dispute arises, one arbitrator being appointed by the Owners or Master and the other by the Charterers or their Agents; and on appointment, and before proceeding with the reference, the two arbitrators shall choose an umpire, and the decision of the arbitrators and/or the umpire shall be final unless either party appeals to the Court in jurisdiction within thirty days after the delivery of the award, or so soon after that period as the Courts may be sitting.

16. Penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight due under this charter.

IN WITNESS WHEREOF we have hereunto set our hands this day.

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.....

.....

Signed in the presence of .....

.....

We certify this to be a true copy of the original Charter-Party in our Possession.

.....

THE 1890 BLACK SEA CHARTER-PARTY

It is this day mutually agreed between

Owner of the good Steamer called the

Flag, and classed

of the measurement of gross/net Register Tons, or thereabouts, whereof is Master, now

and of Freighters.

1. That the said steamer, being tight, staunch, and strong, and every way fitted for the voyage, having leave to take a cargo for owner's benefit, from any ports in the United Kingdom or Continent or Mediterranean direct and/or to any ports in the Mediterranean, Adriatic, Black or Azoff Seas and/or any ports on the way, shall with all convenient speed, sail and proceed to and as there ordered by within six running hours of arrival, or lay days—Sundays only excepted—to count, to or so near thereunto as she may safely get, and there load, always afloat, from the factors of the said freighters, a full and complete cargo (but not exceeding tons English weight) of Wheat and/or Seed and/or Grain at the option of the freighters (if a mixed cargo,

notice of the descriptions and quantities to be given before loading commences, and the heaviest goods to be supplied first) which said freighters bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall therewith proceed to a safe port in the United Kingdom, or a safe port on the Continent, between Havre and Hamburg (both inclusive), or to a safe port in the Adriatic or Mediterranean Seas (Spain excluded).

2. Orders for the United Kingdom, Continent, or other stipulated port, unless given on signing of Bills of Lading, are to be given at Gibraltar within 12 running hours of arrival, or lay days—Sunday only excepted—to count.

3. The Charterer has the right to order the steamer from Gibraltar to Queenstown, Falmouth or Plymouth (at Master's option) for final orders, to be given within 12 running hours (24 at Queenstown) of arrival, or lay days—Sundays only excepted —to count, for the United Kingdom, Continent, or for other stipulated Continental port not West of Havre, paying 1/- per unit extra freight over and above the rates hereinafter stated.

4. Should the Charter contain an Adriatic or Mediterranean option, unless notice is given to Captain on signing Bills of Lading to proceed to Gibraltar direct, in which case the Adriatic and Mediterranean options become null and void, orders for an Adriatic or Mediterranean port East of Malta are to be given on signing Bills of Lading or at Constantinople in passing, and unless so ordered the steamer shall proceed to Malta for orders to be given within 12 hours or lay days—Sundays only excepted—to count, for a Mediterranean port West of Malta, or for a United Kingdom or Continental port or for other stipulated ports or to United Kingdom for further orders, but having so called at Malta the right to order from Gibraltar is thereby cancelled, and the freight to the United Kingdom, Continent or other stipulated ports shall be the same from Malta as though ordered from Gibraltar.

5. The steamer shall proceed as ordered to the port of discharge, or so near thereunto as she may safely get, always afloat, there delivering the cargo on being paid freight as follows, viz.:—

All per unit delivered as per scale in the margin, being in full of all port charges and pilotages as customary. The freighters engage to provide the necessary mats for dunnage, and separation of different kinds of cargo. The cargo to be brought and taken from alongside the steamer at freighters' expense and risk, but the crew to render all customary assistance in hauling lighters alongside. In loading and lightening, the Master shall use all reasonable diligence to prevent spillage by placing tarpaulins or canvas between the steamer and the lighters. The Charterer, by his Agents, has the right to be on board the steamer whilst loading or discharging for the purpose of inspecting the cargo.

He is also entitled to check the weight and generally supervise his interest therein.

6. The Master has leave to sail with or without pilots, to call at any ports for coal, to tow or be towed, and to render assistance to other vessels in distress.

7. running days, Sundays, Good Friday, Easter-Monday, Whit-Monday, and Christmas Day excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days, at fourpence per ton on the steamer's gross register tonnage per running day. Lay days at port of loading are not to count before the next (new style), unless both steamer and cargo be ready earlier. The freighters have the option of cancelling this Charter if the steamer does not arrive at port of loading and be ready to load on or before midnight of next (new style), unless the steamer has been detained waiting for orders as to loading port longer than six hours, in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the Charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not.

8. Cash at port of loading, not exceeding £ to be advanced the master, if required, free of interest and commission, to be deducted from the freight with cost of insurance thereon.

9. The freight is to be paid on unloading and delivery of the cargo, if in the United Kingdom, in Cash, and if elsewhere, in Cash in Gold, at the current exchange for bankers' sight bills on London.

A. Should it be necessary to lighten the vessel to reach the open sea, the same to be at steamer's expense and merchant's risk.

B. If the steamer be ordered to Nicolaieff, and ice (except in the Spring) prevents her entering the port, this Charter shall be null and void. Should frost ensue (except in the Spring) after the steamer has arrived at Nicolaieff and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave without cargo, in which case the Charter shall be null and void, or with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff, or Mediterranean port for United Kingdom, Continent, or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers, freight being paid on quantity delivered under this Charter.

C. In the event of any part of the cargo, which has been put into craft, to enable the steamer to pass down the river after the

The Original Charter in our possession.

Captain has signed Bills of Lading, being frozen in, so that steamer is unable to complete the re-loading, she is to wait not less than five days, and if the craft does not arrive, she will be at liberty to proceed to complete her voyage, and shall not be held liable for non-delivery at port of discharge; but the Captain is to inform the Shippers and Charterers by telegram from Constantinople of the quantity left behind.

10. Should the steamer be ordered to a port of discharge inaccessible by reason of ice on the steamer's arrival, the Master shall have the option of waiting until the port is again open, or of proceeding to the nearest safe open port or roadstead (telegraphing his arrival there to freighter), where he shall receive fresh orders for an open and accessible port of discharge in the United Kingdom or Continent as above, within 24 hours of arrival, or lay days to count. If so ordered the steamer shall receive the same freight as if she had discharged at the port to which she was originally ordered; but if ordered to a port more than 100 nautical miles distant from such open port or roadstead, the freight shall be increased by one shilling and threepence per unit. In no case shall the steamer be ordered from a port of call in the United Kingdom to an ice-bound port. Except in the Spring, the steamer shall not be ordered to an ice-bound port for loading.

11. Except as herein provided, detention by frost, ice or quarantine shall not count as lay days.

12. Should the steamer be ordered to discharge at a place to which there is not sufficient water for her to get the first tide after arrival without lightening, and lie always afloat, lay days are to count from 48 hours after her arrival at a safe anchorage, for similar vessels bound for such place, and any lighterage incurred to enable her to reach the place of discharge is to be at the expense and risk of the receiver of the cargo, any custom of the port or place to the contrary notwithstanding; but time occupied in proceeding from the anchorage to the port of discharge is not to count.

13. If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage for which he may be liable under this Charter, if by the use of reasonable diligence he could have obtained other suitable labour; and in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this Charter.

14. The Act of God, Perils, Dangers and Accidents of the Sea or other Waters, of what nature and kind soever; Fire from any cause on Land or on Water, Barratry of the Master and Crew, Enemies, Pirates and Robbers, Arfests and Restraints of Princes, Rulers and People, Explosions, Bursting of Boilers,

Breakage of Shafts, or any latent defect in Hull and/or Machinery, Strandings, Collisions, and all other Accidents of Navigation, and all Losses and Damages caused thereby are excepted, even when occasioned by negligence, default, or error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners, but, unless stranded, sunk, or burnt, nothing herein contained shall exempt the Shipowner from liability to pay for Damage to cargo occasioned by bad stowage, by improper or insufficient Dunnage, or absence of customary ventilation, or by improper opening of Valves, Sluices, and Ports, or by causes other than those above excepted; and all the above exceptions are conditional on the Vessel being Seaworthy when she sails on the voyage, but any latent defects in the Hull and/or Machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the Owners, or any of them, or by the Ship's Husband or Manager.

15. No Cargo (other than freighters') or cattle to be shipped without the written sanction of the shippers, except as herein provided.

16. The Master is to telegraph from Constantinople and (unless taking cargo to the loading port) from his last port of outward discharge to of naming the date of the steamer's departure, and to apply to at for cargo; failing to telegraph as above, three days are to be added to the lay days.

17. If the nation under whose flag the steamer sails shall be at war, whereby the free navigation of the steamer is endangered, or in case of blockade or prohibition of export of Grain and Seed from the loading port, this Charter shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped.

18. The freighters' liability on this Charter to cease when the cargo is shipped (provided the same is worth the freight, dead freight, and demurrage, on arrival at port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average.

19. The Mediterranean, Black Sea, and Baltic Grain Cargo Steamer Bill of Lading 1890 is to be used under this Charter, and its conditions are to form part thereof.

20. Penalty for non-performance of this Charter, proved damages not exceeding the estimated amount of freight.

21. The Steamer to be reported at the Custom House in London by to whom Five per cent. on the gross amount of freight and demurrage is due to the steamer on the signment of this Charter, steamer lost or not.

Witness to Signature of

Witness to Signature of

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(*Meanings of words will generally be found under the heading "Words and Phrases."*)

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"SYREN" HANDBOOKS ON SHIPPING LAW.

THE LAW

RELATING TO

FREIGHT

By J. E. R. STEPHENS

OF THE MIDDLE TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW
JOINT AUTHOR OF "THE MANUAL OF NAVAL LAW AND COURT-MARTIAL PROCEDURE," ETC.

PREFACE

OWING to the very favourable reception accorded both by reviewers and the mercantile community to my work on Demurrage, I have been encouraged to prepare another work on similar lines dealing with the Law of Freight, a subject of equal importance to merchants and shipowners with that of demurrage. I have adhered to the plan adopted in my previous work of giving the facts upon which each case has been decided, together with quotations from some of the judgments in the more important cases, for the law relating both to demurrage and freight consists, to all intents and purposes, wholly of what is termed "judge-made" law. This judge-made law is contained in many hundreds of volumes of decided cases, which only a lawyer with a complete legal library can have access to, being wholly inaccessible to the ordinary layman. By giving references to all the known decisions on the subject, as well as selections from the Scotch and American Courts, lawyers who are within reach of a complete legal library are shown the way to a thorough investigation of the subject; whilst for those to whom few books are accessible, or who have not the time to examine them, I have given the best conclusion to which a study of the question has led me, and upon the most important questions, the very words in which the different Courts have stated the law.

From an immemorial period in the English law the doctrine of the authoritative force of judicial precedent has been part of it—a feature which is peculiar to the English and American systems of law. The doctrine as established is shortly this, that a decision by a Court of competent jurisdiction of a point of law, lying so squarely in the pathway of judicial judgment that the case could not have been adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point so decided becomes, until it is reversed or overruled, not merely evidence of what the law is in a like case, but the very law itself which the Courts are bound to follow and apply, not only in cases precisely like the one which was first determined, but also to those which, however different in their origin or special circumstances, stand upon the same principle. In other countries of Europe a judicial decision has no such authoritative force in any other case, whether in the same or any other Court. The reports of the decided cases embody the learning, wisdom, and experience of the judges, often men of great intellectual powers, who during a long period

have made the law the subject of lifelong and profound study. The value of the reports to the lawyer and the judge is absolutely incalculable. They are a mine of wealth possessed by none but the English-speaking race. They are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of the experience of many generations of men shines forth from them to make out and illumine the legislator's pathway.

No law-book, however well written, can exactly state the law applicable to every case that may arise. Even were the law codified, it could never be a reading-made-easy for the public. As every section in the code would be of equal authority, no layman, by reading one part only, could be sure that his induction was sufficiently copious. A code would not do away with the necessity of lawyers; it has not done away with them in those countries where codes have been adopted. Neither can a law-book, dealing with only one branch of law, do away with the necessity for the layman to consult his lawyer on points arising of an unusual character; it can merely explain to the layman the ordinary rules of law relating to that particular branch. To draw inferences from the rules of law laid down in a code or in a text-book in cases of an unusual character and apply them to the particular case, is the work of one skilled in the law.

J. E. R. STEPHENS.

2 ESSEX COURT,
TEMPLE, E.C.

A FEW PRESS NOTICES OF "THE LAW RELATING TO FREIGHT"

"The Daily Telegraph" says:—"The volume is one which should be on every shipping agent's and merchant's bookshelves."

"The Liverpool Journal of Commerce" says:—"It is claimed that the work contains a reference to every decision on the subject, as well as to a number of important American judgments, a result which is a veritable triumph to have accomplished in a treatise so handy in form."

"The Financial Times" says:—"This volume, moderate in price, copiously indexed, well arranged, and, above all, clearly written and easily grasped by the lay mind, may be confidently recommended."

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